HJR

6

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HJR006-OOG-DOE-3-13-07
Bill Version: HJR 6
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG

Title	Constitutional Amendment relating to the office of attorney general	RDU	Elections
		Component	Elections
Sponsor	Representatives Crawford and Harris		
Requester	House State Affairs Committee	Component No.	21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		1.5				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

If this amendment appears on the 2008 ballot, the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58 is $1.5. Should the addition of this questions require the printing of an 8-1/2 by 18-inch ballot the cost will increase to $22.0.

Prepared by: Gail Fenumiai, Asst. Admin. Director — Phone 465-3885
Division: Division of Administrative Services — Date/Time 3/13/2007, 12:30pm
Approved by: Whitney Brewster, Director — Date 3/13/2007
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/18/2006 OMB)

Alaska State Legislature

House of Representatives

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Representative Harry Crawford
District 21

SPONSOR STATEMENT: House Joint Resolution 6

As the highest legal official in the state, Alaska's attorney general serves as legal advisor to the state, prosecutes violations of state criminal law, and enforces consumer protection and unfair trade practice laws. Today, 43 out of 50 states elect their attorneys general.

Alaska, however, remains one of the few states in which the Governor appoints the attorney general. To rectify this, House Joint Resolution 6 would amend our state's constitution to provide for an elected attorney general.

Serving at the pleasure of the Governor exposes the attorney general to a conflict between his or her loyalty to the head of the executive branch and his or her duty to represent and protect the people of Alaska.

This ethical dilemma would be avoided by an elected attorney general. Alaskans deserve an attorney general dedicated to protecting our state's rights with vigor and commitment, without any complications caused by a sense of duty to the Governor. I respectfully ask for your support.

E-mail: Representative_Harry_Crawford@legis.state.ak.us

Methods of Selecting State Attorneys General

State	Popularly Elected	Appointed by Governor	Elected by Legislature	State Supreme Court elects
Alabama	X			
Alaska		X		
Arizona	X			
Arkansas	X			
California	X			
Colorado	X			
Connecticut	X			
Delaware	X			
Florida	X			
Georgia	X			
Hawaii		X		
Idaho	X			
Illinois	X			
Indiana	X			
Iowa	X			
Kansas	X			
Kentucky	X			
Louisiana	X			
Maine			X	
Maryland	X			
Massachusetts	X			
Michigan	X			
Minnesota	X			
Mississippi	X			
Missouri	X			
Montana	X			
Nebraska	X			
Nevada	X			
New Hampshire		X		
New Jersey		X		
New Mexico	X			
New York	X			
North Carolina	X			
North Dakota	X			
Ohio	X			
Oklahoma	X			
Oregon	X			
Pennsylvania	X			
Rhode Island	X			
South Carolina	X			
South Dakota	X			
Tennessee				X
Texas	X			
Utah	X			
Vermont	X			
Virginia	X			
Washington	X			
West Virginia	X			
Wisconsin	X			
Wyoming		X		
Total per Method:	**43**	**5**	**1**	**1**

Prepared by the office of
Rep. Harry Crawford

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

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RDU: Elections
Component: Elections

Sponsor: Representatives Crawford and Harris
Requester: House State Affairs Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

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TOTAL	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

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Prepared by: Gail Fenumiai, Asst. Admin. Director
Phone: 465-3885
Division: Division of Administrative Services
Date/Time: 3/13/2007, 12:30pm

Approved by: Whitney Brewster, Director
Date: 3/13/2007
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/18/2006 OMB)

Nancy Manly

From: Whitney Brewster [whitney_brewster@gov.state.ak.us]
Sent: Wednesday, March 14, 2007 12:30 PM
To: Nancy Manly
Subject: HJR 6 Hearing

Hi Nancy:

I trust that you received the Division of Elections' fiscal note for HJR 6. The $1500 figure within this fiscal note reflects the costs associated with printing the constitutional amendment information in the Official Election Pamphlet (pro/con statement, leg affairs neutral summary, full text of the bill, ballot summary, cost statement). Because the fiscal note is relatively straightforward, I was not planning to attend the House State Affairs hearing. However, I do not want questions from committee members to go unanswered and can be available if necessary. Have you heard any questions from committee members regarding this bill?

Sincerely,
Whitney Brewster
Division of Elections

Bill was held

4-19-07

work on it
Probably during
the interim?

{ Gruenberg says
Potential issues

4-19-07
2 amendments so far
1 withdrawn Amend #2 Johnson
1 failed Amend #1 Bell.

25-LS0420\A.2
Bullard
4/13/07

AMENDMENT 2

OFFERED IN THE HOUSE BY REPRESENTATIVE JOHNSON

TO: HJR 6

Page 1, line 14, following "be":

Delete "elected"

Insert "nominated"

Page 1, line 15, following "law":

Delete "by the qualified voters of the State at the same time and for the same term as the governor"

Insert "for other elective offices. In the general election, the votes cast for a candidate for governor shall be considered as cast also for the candidate for attorney general running jointly with the candidates for governor and lieutenant governor. The candidate whose name appears on the ballot with that of the successful candidate for governor shall be elected attorney general"

Page 2, line 7, following "elected":

Insert "in the manner provided by law"

Library

25-LS0420\A.3
Bullard
4/17/07

failed

AMENDMENT 1

OFFERED IN THE HOUSE BY REPRESENTATIVE DOLL

TO: HJR 6

Page 2, line 5:

Delete "There shall be no limit on the terms of the attorney general."

Page 2, following line 5:

Insert a new subsection to read:

"(b) No person who has been elected attorney general for two full successive terms shall be again eligible to hold that office until one full term has intervened."

Reletter the following subsection accordingly.

Alaska State Legislature
House of Representatives

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(phone) 1-907-269-0100
(fax) 1-907-269-0105

Representative Harry T. Crawford, Jr.
East Anchorage District 21
E-mail: Representative_Harry_Crawford@legis.state.ak.us
Website www.akdemocrats.org

MEMORANDUM

To: Representative Bob Lynn, Chairman
House State Affairs Committee

From: Representative Harry Crawford

Re: Scheduling Request, House Joint Resolution 6

Date: February 6, 2007

I respectfully request that the House State Affairs Committee schedule House Joint Resolution 6, "Proposing amendments to the Constitution of the State of Alaska relating to the office of attorney general," for a hearing as soon as possible.

I have attached a sponsor statement, supporting documents, and the most recent copy of House Joint Resolution 6. New supporting documents and letters of support will be forwarded to your office as soon as they become available. Once a committee hearing is scheduled, any teleconference request and names of witnesses wishing to testify will also be provided.

Please contact me if you have any questions or require any additional information.

1	1959 — 1960	William A. Egan	John L. Rader
2	1961 — 1962	William A. Egan	Ralph E. Moody* / George N. Hayes
3	1963 — 1964	William A. Egan	George N. Hayes
4	1965 — 1966	William A. Egan	Warren C. Colver*
5	1967 — 1968	Walter J. Hickel	D.A. Burr / Edgar Paul Boyko*
6	1969 — 1970	Keith H. Miller	G. Kent Edwards
7	1971 — 1972	William A. Egan	John E. Havelock
8	1973 — 1974	William A. Egan	Norm Gorsuch
9	1975 — 1976	Jay S. Hammond	Avrum Gross
10	1977 — 1978	Jay S. Hammond	Avrum Gross
11	1979 — 1980	Jay S. Hammond	Avrum Gross / Wilson Condon
12	1981 — 1982	Jay S. Hammond	Wilson Condon
13	1983 — 1984	Bill Sheffield	Norm Gorsuch
14	1985 — 1986	Bill Sheffield	Norm Gorsuch / Hal M. Brown
15	1987 — 1988	Steve Cowper	Grace Berg Schaible
16	1989 — 1990	Steve Cowper	Doug Baily
17	1991 — 1992	Walter Hickel	Charlie Cole
18	1993 — 1994	Walter Hickel	Charlie Cole / Bruce Botelho
19	1995 — 1996	Tony Knowles	Bruce Botelho
20	1997 — 1998	Tony Knowles	Bruce Botelho
21	1999 — 2000	Tony Knowles	Bruce Botelho
22	2001 — 2002	Tony Knowles	Bruce Botelho
23	2003 — 2004	Frank Murkowski	Gregg Renkes
24	2005 — 2006	Frank Murkowski	Gregg Renkes / David Marquez
25	2007 — 2008	Sarah Palin	Talis J. Colberg

Notes and Sources: Overlaps for Attorneys General may not conincide exactly with the years. *Asterisks indicate the individuals are deceased.

Alaska Directory of State Officials, 1959 to present.

LEGISLATIVE RESEARCH REPORT

APRIL 13, 2007

REPORT NUMBER 07.207

PROPOSALS FOR AN ELECTED ATTORNEY GENERAL IN ALASKA

PREPARED FOR REPRESENTATIVE MAX GRUENBERG

BY PATRICIA YOUNG, MANAGER

You asked for background on the appointment of the Alaska attorney general and a history of efforts to have the position filled by election rather than by appointment, as is presently the case. As you know, the Alaska Constitution calls for an executive branch under the supervision of the governor, who appoints the head of each principal department with confirmation by a majority of the legislature in joint session (Article III, Sections 24 and 25). As you know, in order for the attorney general position to be filled by election, the constitution would need to be amended.

According to Gordon Harrison, author of *Alaska's Constitution: A Citizen's Guide*, the convention delegates were determined to create a unified and efficient executive branch. As such, the constitutional scheme was designed to

> avoid the fragmentation of executive authority that results from independently elected department heads. . . . firmly committed to the principle of a strong and accountable governor, [the delegates] rebuffed several efforts to weaken the governor's control over the attorney general, including proposals to elect the attorney general.[1]

Over the years there have been many attempts to amend Article III of the constitution in order to elect the attorney general. Mr. Harrison notes that from the first through the 13th Legislatures (1959 - 1984), 26 resolutions and one bill for an advisory vote on the question came before the legislature.

The following table shows resolutions and advisory vote bills on the issue from 1985 (the 14th Legislature) through the present. We also include the sponsor, and the final status of each of the

---

[1] As Delegate Ralph Rivers argued, "... if you are going to let the governor's administration be held responsible for the conduct of that administration, you have got to at least give the governor an attorney general of his own choice. Under [the proposal for an elected attorney general] he might get an attorney of the opposite political faith. He might get one of his own party who is either inadequate or who is hostile to him. . . . In either case, the governor could say at the end of his term, if things haven't gone well, 'We had a good program but that attorney general you foisted upon me wrecked our program.' *Proceedings of the Constitutional Convention*, p. 2198. Cited by Gordon Harrison, "Issue of an Elected Attorney General in Alaska," Legislative Research Report 95.150, March 9, 1995.

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Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

measures introduced prior to the 24th Legislature; the status is "current" for the measure before the 25th Legislature.

Measures Proposed to Elect the Alaska Attorney General, 1985 to Present

Legislature	Measure	Sponsor	Final or Current Status
14th Legislature (1985 - 1986)	HJR 42	Marrou	(H) STA
	SJR 9	DeVries	(S) RLS
19th Legislature (1995 - 1996)	SJR 26	Green	(S) FIN
20th Legislature (1997 - 1998)	HJR 19	Green	(H) JUD
	SJR 10	Green	(S) FIN
21st Legislature (1999 - 2000)	HJR 43	Coghill	(H) JUD
	SB 69 (advisory vote)	Ward	(S) FIN
	SJR 32	Kelly (Pete)	(S) JUD
	SJR 14	Ward	(S) RLS
24th Legislature (2005 - 2006)	HJR 13	Crawford	(H) STA
	SJR 7	Dyson	(S) STA
25th Legislature (2007 - 2008)	HJR 6	Crawford	(H) STA

NOTES: For measures during the 14th through the 24th Legislatures, the status is "final"; the status is "current" for the measure that is before the 25th Legislature.
SOURCES: 14th through 17th Legislatures–*Alaska Final Status of Bills and Measures*; 18th through 25th Legislatures–Bill Action and Status Inquiry System

In regard to the arguments for and against changing the status quo, those in favor of an elected attorney general site objectivity and independence from the interests of the governor. They contend that an elected attorney general is better able to vigorously safeguard interests of the state at times when those interests do not coincide precisely with a governor's political values.

Those who support the appointment process for the post, on the other hand, point out that, as politicians, elected attorneys general cannot be free from political influences. As one former attorney general put it, "Appointed AGs are lawyers who have an interest in politics and elected AGs are politicians who are lawyers."[2] As such, the relationship between the governor and the attorney general may be adversarial as well as inefficient.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

[2] Avrum Gross, testimony on SB 69 before the Senate Judiciary Committee, February 24, 1999.

Alaska Constitutional Convention Minutes
Day 53

Alaska Constitution Day 53

BARR: Mr. President, I have an amendment t· insert after Section 13. It is on the Secretary's desk.

PRESIDENT EGAN: Between Section 13 and Section 14?

BARR: Yes, it will be a new Section 14.

PRESIDENT EGAN: The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Page 6, line 16, after Section 13, insert a new Section 14, and renumber the following sections accordingly: "An Attorney General shall be elected at the same time and in the same manner as the Governor, and his term of office shall be four years. He shall be the chief law officer of the State, shall represent the State in all courts of law, and shall see that all laws are uniformly and adequately enforced throughout the State. He shall be legal advisor to the Legislature and all State officers, and shall perform such other duties as may be prescribed by law. He shall be responsible to the Governor and the Legislature for the faithful performance of his duties.

The Attorney General shall receive for his services a compensation fixed by the Legislature which shall not be increased or diminished during his term of office. He shall devote his full time to his office and shall not receive any salary, fees or other compensation from any other source. In case of vacancy in the office of Attorney General

for any cause, the Governor shall appoint his successor to complete the term of office with the consent of a majority of both Houses of the Legislature in joint session assembled, or, when not in session, a poll of the members may be taken by mail by the President of the Senate and Speaker of the House."

PRESIDENT EGAN: What is your pleasure, Mr. Barr?

BARR: I move the adoption of this amendment.

PRESIDENT EGAN: Mr. Barr moves the adoption of the amendment. Is there a second to the motion?

KNIGHT: I'll second the motion.

PRESIDENT EGAN: Mr. Knight seconds the motion. The amendment is open for discussion. Mr. Barr.

BARR: Mr. President, as this is rather a long amendment --

PRESIDENT EGAN: The Chair would like to make an announcement at this time, before you proceed, Mr. Barr. The News Miner just called and Guy Rivers, brother of Vic and Ralph, was found alive and safe about 30 minutes ago. (Applause) He has been picked up and is now on his way back to Fairbanks. Mr. Barr.

BARR: I have had placed on all the delegates' desks a mimeographed copy of the text of this amendment. It is not the complete amendment showing the lines and paragraph, it is merely the text. It provides for the election of the attorney general, that is the gist of it.

He shall be elected at the same time and manner as the governor. He shall be legal adviser to the legislature and all state officers, and shall perform such other duties as may be prescribed by law. It outlines his duties and it provides for his replacement in case there is a vacancy. Now, in presenting this amendment, I do not go against the thought of the Executive Committee in that we should have a strong executive.

Some people will think so. I went along with their committee report and I still do not disagree with it; however, the reason I decided finally to put this amendment in was the fact that I met innumerable people, speaking to them privately, who thought that the attorney general should be elected. In fact, they stated it in broader terms, they said they would like to elect more officials than the state governor. None of them stated that they wanted to elect as many as we have now, that they wanted to reduce the governor's power, but they thought they should elect enough so that they felt they had a hand in the government themselves. I felt that if another official should be elected, it should be the attorney general.

Why the attorney general? Because all these other department heads are there expressly to carry out the governor's program and should agree with him in every detail on his policy. That makes up a good working team. The attorney general also should work with the governor, he is the governor's legal counsel and the legislature's legal counsel and also counsel for all the department heads, but he has one other duty that does not quite conform to the usual idea of a department head's duty under administration and that is, he is called upon to interpret the law at times. That is a semi-judiciary function, I would call it, although it's not final. It is a temporary decision and may be taken into the courts. In

interpreting the law, he should be impartial. Many times, of course, the governor might ask him to interpret the law to be sure that he is on the right ground when he proposes something. In case we had a governor who wanted to bulldoze something through anyhow, if it were a little bit questionable, the attorney general might feel that he was obligated to the governor if he were appointed and his opinion might be biased a little bit.

I wouldn't say that he would flout the law, but he could be biased a little bit to either one side or the other. And even if he were entirely honest and tried to render an impartial decision, I'm afraid his conscience would hurt him a little bit because he was obligated to the governor and went against the governor's wishes, so to remove him from that embarrassing position, I think that he should be elected. Now I grant you in electing any man we cannot be sure that we will get a good man, and on the other hand, by appointment we cannot insure that we will get a good man, but I believe that if we are going to elect another official because the people want it, then it should be the attorney general.

PRESIDENT EGAN: Any further discussion? Mr. Marston.

MARSTON: Mr. President, if my recollection is right, in the past 14 years that I have definite recollection of, there have been only two attorney generals and the reason is that they just can't get attorneys to run for that job. I'd want to know that there are attorneys that will step up and lend themselves to be elected to that job before we pass on this. I have no argument with the mover of this amendment, Mr. Barr, except that is information that I would like to have. Maybe we have some lawyers here that could enlighten me on that.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: Mr. President, I think I could answer that. All the lawyers that favor the amendment will probably stand up, and those who don't will sit down. (Laughter)

PRESIDENT EGAN: The Convention will come to order. Is there further discussion of the proposed amendment? Mr. Nolan.

NOLAN: Mr. President, at a meeting that I had, I think there were 12 people there on an hour and a half's notice, that was the one thing they were unanimous on. They wanted the attorney general elected by the people. They seem to think it was the one independent arm that they would have, and for that reason they were unanimous that the attorney general should be elected, and therefore I think I will support Mr. Barr's amendment.

PRESIDENT EGAN: Mr. McLaughlin.

McLAUGHLIN: Mr. President, I voted against the governor and secretary of state as co-runners on the belief that we had merely one elective office in the executive arm and that would suffice, because my other voting had been predicated, and other proposals had been predicated, on that belief we were going to have a strong executive. This is merely the introduction to other offices. I notice we have a Delegate Proposal No. 45 submitted by Mr. Barr, and we have a Delegate Proposal No. 44 also, providing for the election of a commissioner of labor. If we yield ground in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory upon which the voting has taken place.

It was with reluctance that I even voted in favor of the secretary of state as a co-runner for the governor. I am violently opposed to the election of the attorney general. I don't think the election of him accomplishes any purpose. The blunt fact is that there is a general misconception as to the function of the attorney general. The attorney general is a lawyer and his opinion is the equivalent of any other lawyer's. It can be attacked. Any recommendation he makes, if acted upon, can always be attacked in the courts by private citizens. His opinion is worth the paper it is written upon.

It's impressive upon the state and the officials are bound by it until some irate taxpayer attacks it and the actions taken under the authority of it, and the courts can promptly overrule it. There is a misconception about the function of the attorney general, his functions are not quasi-judicial. He is another attorney giving an opinion, and if you could assure yourselves that he would have the wisdom of a deus, those lawyers don't exist in Alaska as it has been evidenced by the variety of opinions ex pressed here before this body. I do oppose it, I think if we are going to have an attorney general, the power should be vested in the governor to appoint him, and that is without any screening by any judicial council or anything of the sort.

If you're going to elect him, elect him, but by and large if you're creating a strong executive, then give him the power to appoint his own attorney general. The discrepancy has been pointed out in New York under the series, Governors and Administration of New York, which is put out under the American Commonwealth Series, it's pointed out that because of the fact that the attorney general is an elective office under the constitution, that is, the governor, in substance, has to rely on a legislative act passed in

1900 authorizing him to have private counsel. You're putting a diverse and possibly a discordant element into the executive branch. It isn't necessary. The courts can protect the government from the opinions of an attorney general appointed by the governor, and that attorney general does, in a sense, bear the same relationship to the governor as any attorney bears to his private client. It is an attorney-client relationship and the relationship has to be based on faith and personal selection. I would strongly recommend that there be no other elective offices in the state.

PRESIDENT EGAN: Mr. Barr.

BARR: Mr. President, may I be allowed to close?

PRESIDENT EGAN: If there is no other person who wishes to be heard. Mr. Stewart.

STEWART: Mr. President, may I ask Mr. McLaugnlin a question?

PRESIDENT EGAN: You may, Mr. Stewart.

STEWART: Is it your idea that the attorney general, as such, he is or should act as the counsel for the legislature, as well as for the executive?

McLAUGHLIN: He should, in substance, act as counsel for the legislature. In many respects, you also have the unusual circumstance where the attorney general is of one party and the legislature is predominantly of another party.

STEWART: He may have to give decisions in one case that might favor the executive and in another case might favor the legislature?

McLAUGHLIN: That's right.

STEWART: I think that is an unwholesome situation, and should be corrected by having the attorney general purely and simply the adviser for the executive.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: Mr. President, this has developed to the point where I want to say a few words. I wasn't going to, but when I was attorney general, that office was legislative counsel for the legislature, advised the members of the legislature, advised the various administrative departments under the governor, and advised the governor, and wrote legal opinions interpreting the law.

Since that time the legislature has created a Legislative Council, that Legislative Council has a political scientist in charge, Jack McKay. It could very well have a lawyer and is authorized to engage any legal services that may be required. The legislature has full power to hire all the legal assistance it needs during the sessions so that I believe that Mr. Stewart's thought is well taken, that the attorney general will be the attorney for the executive arm of the government and that if we have the governor appoint an attorney general, he is not going to be the adviser to the legislature nor the drafter of legislative bills.

Now, he may draft proposed legislation for the administrative departments. If the department of health wants a bill, the governor will tell the attorney general to get out a good bill or the commissioner of health, or as the case may be. They'll fall back on the attorney general for some bill drafting for the governmental departments, but the

legislature from now on and under this setup, is not going to have the attorney general doing its bill drafting. It's going to have its own legal counsel. The present Attorney General, because of the press of business, gave up being legislative counsel for the legislature three years ago and told them they were too busy and were just looking after the executive department, and that they were to figure out how to get their own bills drafted. Two years ago that situation got so acute that the Legislative Council was created and it serves a very useful need, but I think that Mr. McLaughlin actually emphasized the wrong answer when he said that the attorney general would be the counsel for the legislature as well as for the executive arm, because under the present development with Legislative Council, he will be the attorney for the executive branch and the legislature can take care of itself.

I might also say that I wrestled with this, I started out advocating that the attorney general be elected, but I wrestled with it, I told Mr. Barr that I felt the way he did four or five days ago. Because of my doubts though, I have talked to many people, they have said if you are going to let the governor's administration be held responsible for the conduct of that administration, you have got to at least give the governor an attorney of his own choice. Under this setup he might get an attorney of the opposite political faith. He might get one of his own party who is either inadequate or who is hostile to him, or who doesn't see eye-to-eye with him.

In either case, the governor could say at the end of his term, if things haven't gone well, "We had a good program but that attorney general you foisted upon me wrecked our program." There again, you have got passing the buck as to who was to blame because

things didn't go well. Now then, if we want to be sure that the strong executive who is going to have the responsibility of carrying out a successful administration is going to get the blame if he doesn't have a successful administration, let us not give him any outs. Let's not take him off the hook by giving him an attorney general that he can put the blame on.

PRESIDENT EGAN: Mr. Robertson.

ROBERTSON: Mr. President, I don't intend being an applicant for the position of attorney general either by appointment or election, but I don't quite see Delegate Marston's point that there are no attorneys in the Territory who are willing to run to be elected attorney general. I can't see how there would be any attorneys who would be willing to accept the appointment. I support Mr. Barr's position in this matter. I, too, am in favor of a strong executive, but I don't think that the mere fact that because under the appointive system of governorships that the governor virtually has no powers, that we should let that carry us too far away. I think that it is a good thing for the people, to have their own elected attorney general who can check the legislation which the governor proposes to introduce and have introduced, and for that reason I am going to vote for this amendment.

BARR: Mr. President, may I close now?

PRESIDENT EGAN: You may, Mr. Barr.

BARR: I was also going to answer Colonel Marston much as Mr. Robertson did. If lawyers aren't available, they aren't available period. Mr. Rivers was talking about an

entirely different thing. He mentioned our present Legislative Council. There is not a lawyer in charge. They do draft bills for the legislature. They have taken over a duty which the attorney general formerly did, that is as it should be. There is a lot of detailed work there, but it isn't legal work. If the legislature wants to ask a legal opinion, they will not go to our political science experts, they will go to the attorney general. Now he also stated that if an attorney general of the opposite political party were elected, the governor could pass the buck and say, "Well, you people see what you saddled me with here. I couldn't do anything. He wouldn't let me." Well, if there was an attorney general of the opposite political party there, he would make the governor toe the line pretty well as far as the law was concerned.

All the governor could say to the people is, "You see that attorney general, he made me conform with the law." That's all this is designed to do. It isn't supposed to restrict his actions otherwise, just to conform with the law. Now, as Mr. McLaughlin said, because he was the legal counsel for the governor period, that this would not accomplish any particular purpose. It will accomplish several purposes. It is up to you people to decide how important they are. It might provide a little brake on the governor if he wants to go too far. If he wants to over-step the law just a little bit, but the principal purpose it has the principal objective it will achieve is that it will allow the people to have more hand in the government and that is what we want.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: I request a roll call on this vote and will raise my hand to indicate that request. Under these rules, 10 people have to --

PRESIDENT EGAN: No, that rule failed of passage.

HELLENTHAL: Oh, I see.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Barr be adopted by the Convention?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 12 - Barr, Collins, H. Fischer, Laws, McNealy, Metcalf, Nolan, Robertson, Smith, Sweeney, Taylor, Walsh.

Nays: 40 - Armstrong, Awes, Boswell, Buckalew, Cooper, Cross, Davis, Doogan, Emberg, V. Fischer, Gray, Harris, Hellenthal, Hermann, Hilscher, Hinckel, Hurley, Johnson, Kilcher, King, Knight, Lee, Londborg, McCutcheon, McLaughlin, McNees, Marston, Nerland, Nordale, Peratrovich, Poulsen, Reader, Riley, R. Rivers, V. Rivers, Rosswog, Stewart, Sundborg, White, Mr. President.

Absent: 3 - Coghill, VanderLeest, Wien.)

CHIEF CLERK: 12 yeas, 40 nays, and 3 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption. Mr. Barr.

Alaska Constitutional Convention Minutes
Day 55

Alaska Constitutional Convention Minutes Day 55

V. RIVERS: I have an amendment.

PRESIDENT EGAN: You have an amendment by the Committee?

V. RIVERS: By a minority group of the Committee, myself and Mr. Harris.

PRESIDENT EGAN: Mr. Victor Rivers, you may present your proposed amendment. The Chief Clerk may present the proposed amendment.

CHIEF CLERK: "After Section 14, page 7 of Committee Proposal No. lO/a, insert a new section as follows: 'Section 15.

The Attorney General shall be appointed by the Governor from two or more qualified persons nominated in the same manner as judges by the judicial council. He shall have been admitted to practice law in the State and shall have the other qualifications prescribed herein for heads of principal departments and shall be subject to approval by the Legislature in a similar manner.

The Attorney General may be removed by the Governor with the consent and approval of both houses of the Legislature meeting jointly.' Renumber successive sections to conform to the above insertion."

V. RIVERS: I move the adoption of the amendment.

PRESIDENT EGAN: Mr. Victor Rivers moves the adoption of the amendment. Are there copies available for the delegates? Is there a second to Mr. Rivers' motion?

HARRIS: I second the motion.

PRESIDENT EGAN: Mr. Harris seconds the motion. The matter is open for discussion. Mr. Victor Rivers.

V. RIVERS: Mr. President, this matter of the office of attorney general came up for a good deal of discussion in connection with the strong executive and in connection with the matter of having some screening for the man who would be the attorney general. Some of the Committee felt that it would interfere with the strength of the executive. Others of the Committee felt they wanted to see the attorney general elective and not removable by the governor. It seemed that the only thing that was of main concern to a great many of us was that while we recognize the value of the strong executive, we are not naive enough to think that the governor who is elected will not have certain obligations, commitments, endorsements to meet when he goes into office.

We realize that on all the other department heads there may have to be on his part some compromise with his desires under this plan as we have it. We did, however, want to try to eliminate any matter of the return favors or endorsements or obligations to the man who he appointed as attorney general. We are trying to remove that particular office by a screening process we have set up here, so the man who went in there, his appointment would be based on merit and not on any other consideration. As you will note, we have recommended that the attorney general be screened by the Legislative Council in regard to his qualifications, that two or more be screened in accordance with the requirements to fill the job satisfactorily both on the basis of qualifications and on the basis of the governor's desires.

The only intent in this is that the attorney general shall be one who is appointed not from the point of view of any obligations from the governor to him, and also the other intent is that the attorney general cannot be removed by the governor without also the approval of the legislature meeting jointly as they approved the appointment of the attorney general at the time he was actually put into office. He would be removed in the same manner, and by that manner only. There has been a good deal said here about diluting the power of the strong executive. I am of the opinion that perhaps a governor going into office where he had to make a large number of appointments, where he had been supported in his campaigns by many individuals who might be men of high degree of competence or

average competence, I would be of an opinion that a governor in that position would probably welcome the possibility of the chance of appointing one office in such a manner that he would not have to repay any obligations or indebtedness or favors in that particular appointment. I for one feel the attorney general's office should have removed from it the need for making any concession to competence or qualifications because of political support on the part of the applicant to the governor in seeking election. That is my opinion and I feel there is sound justification for that opinion. I realize there are many divergent opinions here on that subject.

PRESIDENT EGAN: Is there further discussion? Mr. Buckalew.

BUCKALEW: Mr. President, from the beginning I would like to state that I don't like this proposal. The first objection I see is that we are shovin_ off on the judicial council a function that is not one of their duties. The judicial council was created by Mr. McLaughlin's department. He set up a judiciary. Now we are going to let Mr. McLaughlin's department select an attorney general. Not only does the attorney general have to be approved by the judicial council. the attorney general then has to be approved by the legislature. If the governor wants to remove him he has to get the consent of the legislature. Now, I don't think this matter would even have come up if we had not discovered that the initiative and referendum article referred to the attorney general. The reason I br..g that up is that I think Mr. Sundborg had an excellent suggestion that we just insert the words "secretary of state". That is probably one of his functions. That is the only reason I think this business came up. We decided yesterday that we were not going to elect the attorney general. The argument put up by the Committee was they wanted to have a strong executive and today they are going to water it down a little. I think we ought to be consistent and vote this amendment down.

V. RIVERS: I rise to a point of order. I stated this matter had been discussed some time ago in Committee. It did not arise yesterday. This amendment was prepared during the time of that discussion. I also object to referring to any department of this constitution as being the department of some one individual. I don't believe it is either Mr. McLaughlin's or mine or anybody else's; it is the constitution of all the people of Alaska.

PRESIDENT EGAN: Mr. Harris.

HARRIS: I was going to correct Mr. Buckalew, but since Mr. Rivers has already done so, I will only state that I would favor this amendment. We talked about this quite a bit in Committee, and it is a check on the governor. It makes a bit of difference when the attorney general's word becomes law. It actually is law, unless it is disputed in court and found to be not exactly as it is supposed to be, then it is used as law. Therefore, we feel the attorney general should be a qualified man and in order to insure that his qualifications are up to par we needed some type of screening process. Now, we did not screen the man because we wanted to connect him with the judicial department as Mr. Buckalew suggests. The only reason for using the judicial council we feel is that the judicial council is qualified to screen the attorney general. Therefore, that was the reason for bringing up this amendment.

PRESIDENT EGAN: Mr. McLaughlin.

MCLAUGHLIN: I agree with Mr. Victor Rivers that the judicial council is not the idea that it was limited to one person; it was the product of the Judiciary Committee's combined thought. I am personally opposed to such a method of selection. Within my knowledge there is only one equivalent method of selection of the attorney general, and that is probably in New Hampshire where the attorney general is selected by the justices of the supreme court. I believe that Mr. Buckalew is right in that he says that the attorney general is not otherwise mentioned in the constitution except in the initiative and referendum, and if you can recall, the only reason he was mentioned in the article on the initiative and referendum was originally they had a proposal as it came out of committee, my recollection is, that the 10 qualified voters could submit a proposition to the attorney general, and secure his opinion as to its legality. That is why the attorney general was mentioned. We chopped the portion requiring an opinion of legality from the attorney general, we chopped the portion, if I recall, requiring review of his opinion, and in substance what we did is we made it a function as it stands now, the true function of the secretary of state. The attorney general is in there by happenstance and no other reason. Yesterday we determined that the attorney general should not be elected and implicitly

what we determined was it should be within the discretion of the governor subject possibly to confirmation that the governor alone in his discretion would select the attorney general and would be responsible for him. The attorney general, apparently, under the concept that we have implicitly accepted, is an attorney largely for the executive department. In any event, he is a political appointee, he is an executive appointee. I don't believe that we should be putting him through a means test and running him in substance through the judicial council. Under such circumstances, the governor may well say when the attorney general proves unsatisfactory to the electorate at large, the governor should have the direct responsibility, he should not be able to evade it by saying, "It was not my selection." I am opposed to it. The judicial council was designed in the constitution deliberately for one reason. That was for the selection of the justices of the superior and supreme courts, when in substance we are now utilizing them to provide a rather cathartic attorney general.

I think that this is a mere compromise, it is not a majority opinion of the Committee on the executive and certainly it has not been considered by the Judiciary Committee. I cannot speak for them, but I feel sure that the majority would feel the same way. Our choice is not a compromise. He is either elected or he is appointed. If he is appointive and if he is going to be one of the consorts of the governor and one of his confidants, he should be selected directly by the governor and the governor should be responsible. If we accept this, then in premise we should accept a screening of every other public official appointed by the governor in his cabinet. I believe the attorney general, if he has to be mentioned, and I don't think it necessary, I don't think he should be embodied in the constitution. The attorney general should be like the attorney general of the United States, appointed by the executive and the executive is responsible for him. This is, frankly, I think on its face, a compromise measure and I believe the attorney general is without our sphere, and in substance should not even be mentioned in the constitution, let alone nominated by the judicial council.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: May I ask a question of Mr. McLaughlin? Would we gather from your statements that the judicial council is limited only in its purpose to the selection or the recommendation of judges?

MCLAUGHLIN: That is not so, Mr. Rivers, because we have a specific provision in there saying that they shall perform such other duties as are provided by law. I am sure it was the intent of the Convention that their functions would be limited to the judicial. In fact, I think by error you did remark that the attorney general was selected by the Legislative Council when you supported this matter, but I would oppose it just as I would oppose the judicial council selecting the sites of the court houses. I think they are participating now in the executive functions of government and I believe the judicial council should be limited as it has been historically to judicial affairs and not to executive affairs.

V. RIVERS: Do you agree with the judicial council in the matter of screening this man as to qualifications, would be doing the same thing as if he were screening a judge? Isn't it for qualifications and to remove the judge from direct political election or appointment that we put up the judicial council? Isn't the process of screening identical in the two cases?

MCLAUGHLIN: Yes, the process of screening is identical except for this one thing. A judge is supposed to be dispassionate. He is not supposed to be acceptable to the people who appear before him. In the case of the attorney general the attorney general will have a client-attorney relationship to the governor and frankly I believe the governor should have wider choice and discretion. It is like selecting the presidential physician by vote of a selection board. The relationship is something that is intimate, and there is an intimacy of relationship that does not exist between the judiciary and the general public. We are selecting an attorney for the governor and saying, that's it, without regard to personality or anything of the sort.

V. RIVERS: I would like to ask another question, and that is, do you think the attorney general should also be removable at will by the governor at any time after he has been appointed and confirmed?

MCLAUGHLIN: I think that is so, yes.

V. RIVERS: Do you think the attorney gen al represents the people of the Territory in the matter of his interpretations of law, or does he represent the administration? I realize the interests at most times are coincidental and the same, but at times when there is any divergence would you also say he represents the people?

MCLAUGHLIN: Frankly, I think the attorney general represents the executive department of the government.

PRESIDENT EGAN: Mr. Taylor.

TAYLOR: Mr. President, I cannot follow the reasoning either of Mr. McLaughlin or Mr. Buckalew. I think the screening set up in this proposed amendment to Article lO/a is I think a happy choice. It may be a compromise, but I think it is a very fine compromise, in between the two propositions that have been advanced in choosing the attorney general. I believe the judicial council is the proper body to, what you call, screen the attorney general. The duties if given to the judicial council will be the same as they are in regard to the justices of the supreme court and the judges of the superior court. It is to select a competent lawyer to fill the office of attorney general just as they are duty bound to select the best men they can for judicial office.

The office of attorney general is a very important office. There has been numerous times in the history of the Territory of Alaska when we have had an extremely weak attorney general and the Territory has suffered by it. If we have a capable attorney general I think we will be a great deal better off if the attorney general is vigorous and follows out the instructions of the governor in fulfilling his office. I feel the attorney general is only, his duties should primarily be the attorney for the executive branch of the state government. In the past there has been times that the attorney general has had to be the legal officer for

the executive, Legislative Council, and the counsel for all departments of the Territory. That was extremely a difficult position. I know Mr. Rivers had it for a number of years and he can explain, perhaps better than I can, the difficulties of filling of positions such as that, but I believe primarily the attorney general is the attorney for the governor and the department heads, the departments established by this constitution and who would be under the direct supervision of the governor.

I feel that some provision maybe should be made here or the legislature should make one for the employment of a legislative counsel during the sessions of the legislature, and so the attorney general would not have to take a part in that particular matter. I feel that the adoption of this amendment with the governor being given the right to remove the attorney general without the consent of the legislature would be a happy choice.

PRESIDENT EGAN: Mr. Davis.

DAVIS: Mr. President, it seems to me from the arguments we have heard that probably we are going at this backwards. The arguments have been as to how we should select an attorney general. Now it is my thought on the basis of the bill that we have here that probably what we want to decide is whether we want a constitutional attorney general or not. It seems to me on the executive department, as we have outlined it here so far, that we probably don't want a constitutional attorney general at all; that that matter should be left to the legislature as to whether we do or don't and to what his powers are when the legislature decides to set up an attorney general, and accordingly it seems to me pointless to discuss as to how the attorney general is to be selected.

If it is wise in the view of the legislature when they set up an attorney general that he should be screened by the judicial council, these arguments could be made at that time, but at the minute we have not mentioned an attorney general, and it seems to me that the executive department is going to be a whole lot more what the Committee had in mind if we don't set up an attorney general as such in this article. Now I realize that if we don't set up an attorney general we are going to have to do something to the initiative, but that is a different problem and no problem from my standpoint.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: It has been said that perhaps we could omit mentioning an attorney general in this article and that the secretary of state could take over the function of the attorney general with regard to the initiative and referendum. In the initiative and referendum article we said that the initiative should consist of a petition with a proposed bill that the sponsors wished to have made into law and that the attorney general would scrutinize it as to sufficiency for form and the attorney general would condense the matter for appropriate petition heading so that the people that sign it would have an adequate draft as to what they are signing. Afterwards the attorney general shall prepare the ballot title, assuming that enough signatures were obtained and that this bill were to go before the voters.

It is a little difficult I think for the secretary of state to engage in all of those legalities, and I think as far as the initiative and referendum is concerned, we ought to have that in the hands of the attorney general just as the initiative and referendum article suggests. However, I see difficulties with this proposed amendment. The judges are banned from politics. They are picked on an absolutely nonpartisan basis. The attorney general presumably should be a member of the same party as the governor. The attorney general, if he is a member of the same party, as attorney general, would take the normal part in politics, but if he is picked on a nonpartisan basis as the judges are, then we have to ban him from engaging in politics and he also could turn out to be somebody of the opposite party.

So I believe we are getting crossed up if we try to put the attorney general through legislative council. I think we are getting -- the judicial council I mean -- I think we are getting the judicial council into some little difficulties, etc., and from the political standpoint we want to keep them out of it. They can't hold any position or be active on the political scene. So if this particular amendment does not pan out, I am going to propose one as follows: The department heads appointed by the governor shall include an attorney general. Then we can leave the initiative and referendum functions right where they are.

PRESIDENT EGAN: Mr. Londborg.

LONDBORG: Mr. President, as it has been mentioned, this is a minority report from the Committee, and I think it is only right you hear from some of the rest of the Committee regarding this. We in our Committee felt that it would be the wishes of the majority of the Convention to have a strong executive. By that we did not mean a dictator, one who would get into power and be the absolute power in the state, but one who through appointive powers would be able to select his co-workers down through the various offices so that when the state's functions would be successful we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election.

Mention has been made not only here on the floor but also the same argument in the Committee that the governor would have certain obligations and would be expected to lean toward that obligation in the appointing of an attorney general, but I can't help but feel that that same trend of thought would run right down through the other departments, and I believe that there are other departments under the governor that are of equal importance and if the governor is going to bow to party obligations or other obligations in selecting of the attorney general, he will do the same thing all the way through his other department heads, and we won't have a man in there that we can be fully proud of, and I think we are going to want to elect a governor who will be able to stand on his own two feet and appoint the men that he feels should be in the office. I think if he is that type of man he will not only be respected by one party but by all of the people of the state.

As far as the removal is concerned, if we worry that the governor may remove the man at will, if that is not best, we can always insert that he be removed with the consent of the legislature, that is another matter, but as far as the appointing is concerned, I think that is vital right now. As far as screening is concerned, I can see that it might have been good in the past to have the nominations for attorney general screened some way before they even face election by the people. Be that as it may, I think if we elect a governor it is his duty to screen and select a good attorney general. That is part of his job. We are electing him to do that very thing, and if he fails to select a good attorney general then he is that much

more a failure as a governor, and he will stand that test in the coming election. If we feel that the attorney general must be screened so that we have the best possible attorney general, I think it is also necessary that the head of the department of education, head of the department of welfare, health and labor, and all the other department heads be screened by somebody so that this governor gets the right men in his cabinet, so to speak. I certainly feel that he should be able to screen and select a good attorney general as well as select the other department heads. But I think there is one thing that is even more important and we discussed that in the Committee, and that is the matter of compatibility. We have felt in the past that we have not had attorney generals who have been entirely in sympathy with the governor and it has been due to the way the two have gotten to their office.

We elect the one and the other is appointed out of Washington, and we have seen certain cases where they have not worked out in harmony. Now, if the attorney general is to represent the people alone, then of course he should be elected, but as he is to work under the executive department we want a man who is compatible with the governor and with his type of program that he wants to put over in the state, one that understands the governor, one that will work with the governor and ask the judicial council as set up, not to honor party politics but to work in a nonpartisan capacity. Yet I feel they will not be able to do that as far as the attorney general is concerned, and I don't believe there is any more reason to feel that a judicial council nominee would be any more compatible than one elected by the people of the state; if they are going to ask the governor, "Will this man work with you or will that man work with you, do you want this one or that one?"

You might as well say, "Let the governor pick the man in the first place." If they are going to have the liberty to put up a man that will not work with a governor, then we spoil our whole plan for an effective administration. I believe, as Mr. Ralph Rivers mentioned, if we want the attorney general's office mentioned at all in the constitution, it would be very simple on Section 16, line 14, after "department" to insert the words "including the attorney general's office." That would make it very clear that the governor would have the appointive powers and that the attorney general's office would be one that

he would have direct control over. That gives you, I believe, some of the Committee thinking regarding the attorney general being appointed by the governor.

PRESIDENT EGAN: Mrs. Nordale.

NORDALE: I would like to ask Mr. Rivers a question, if I may. Mr. Ralph Rivers, are the services of the attorney general available to the secretary of state in case he needs them?

R. RIVERS: Yes.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. President, I would like to ask Delegate Rivers a question through the Chair, if I may.

PRESIDENT EGAN: You may ask your question, Mr. Buckalew, if there is no objection.

BUCKALEW: Mr. Rivers, I notice that the proposal, that the caption is by Delegate Rivers. My question was whether this was a committee proposal or your separate individual proposal?

PRESIDENT EGAN: Mr. Rivers has already answered that question, Mr. Buckalew. He said that it was actually a proposal of his and of Mr. Harris, Mr. Victor Rivers.

V. RIVERS: In closing this discussion, I will make it brief. I just want to say, in my opinion it is no compromise opinion. If it had been a compromise we would not have this discussion on the floor. It has been pointed to as a compromise. Those of us who submitted this proposal honestly and actually think the attorney general should be screened. Now I wanted to clear up a point that Mr. McLaughlin made. He pointed out that certain appointive methods were used in the State of New Hampshire. They are. The attorney general is appointed by the governor and a council of five. In the State of Tennessee the attorney general is appointed for a period of eight years by the justices of

the supreme court. In four states, as I am able to count, the attorney general is appointed by the governor by and with the consent of the legislature. In three states the attorney general is appointed by the governor and in the balance he is elected by the people. So if you add that up you will find about 38 states in which he is elected; in these two states I have mentioned, Tennessee and New Hampshire, he is appointed under a similar plan, and in the balance of the states he is appointed by the governor with or without the approval of the legislature, as the case may be. It is my thought, and I have observed this rather closely from some contact with the legislature, that while the attorney general is in essence not a judge, he does interpret the law which governs people until somebody challenges his interpretation, and then his decisions oftentimes and most of the time do have the force of law until they are upset or turned over or otherwise disturbed by having somebody appeal to the courts.

It does not seem to me to be a bit out of line that the attorney general should be properly screened as to competence, and in the selection of the attorney general the governor should be relieved of the obligation to repay any favors or to make any particular discrimination in favor of any individual. It has been stated here that we tie the hands of the strong executive. Read this amendment over again. It does not say who the governor shall appoint. It says, "Two or more shall be screened by the judicial council and submitted to the governor for his appointment." He is not limited to the one man or two men or three men. If he can't make his choice he might even have four men, but he does have any obligation removed in making that appointment to any individual. It would be entirely free of a political aspect insofar as it affected the attorney general's competence. There is nothing in here that is counter to common practice, I refer to the State of New Hampshire, the State of Tennessee, and others, but it costs you money if you go to court to upset an attorney general or any other similar official's opinion.

That opinion as I have seen it many times, that opinion has the force of law and interpretation of any laws the legislature may have passed. While you might not view him as a judge, in essence he is a judge of what that law says until it's determined otherwise by the courts. In essence he is a judge of what certain things do that apply to the people. For that reason I think that he should be screened as to competence. I see nothing in that

which weakens the strong executive. The governor might say of the first two appointees named, "I am unable to make a choice; submit me another name." There is nothing that stops him from doing that in the proceedings of the council. It seems to me that some determination which would relieve this office of having to be filled by any repayment of political favor or obligation should be set up, and that is why we have introduced this amendment. It is no compromise.

PRESIDENT EGAN: Mr. Victor Rivers had stated he was closing. No one objected. Unless there is someone who has not spoken -- Mr. McLaughlin.

MCLAUGHLIN: I wanted to ask Mr. Rivers a question. Mr. Rivers, when you say the council in New Hampshire, you mean that five elected executive council who are elected by the people together with the governor?

V. RIVERS: I stated the council of five. The council of five is elected for two-year terms along with the governor and they determine with the governor the appointment of the attorney general.

MCLAUGHLIN: But that is not a judicial council at all, is it?

V. RIVERS: I don't know what their duties are. They are a council of five, but whether they are constituted as ours is, I do not know.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Victor Rivers and Mr. Harris be adopted by the Convention?"

HARRIS: I request a roll call.

PRESIDENT EGAN: Mr. Harris asks that we have a roll call. The Chief Clerk will call the roll on the question.

(The Chief Clerk called the roll with the following result:

Yeas: 18 - Barr, Collins, Cross, H. Fischer, Harris, Hinckel, Kilcher, Metcalf, Nerland, Nolan, Peratrovich, Reader, V. Rivers, Robertson, Rosswog, Smith, Taylor, VanderLeest.

Nays: 36 - Armstrong, Awes, Boswell, Buckalew, Coghill, Cooper, Davis, Doogan, Emberg, V. Fischer, Gray, Hellenthal, Hermann, Hilscher, Hurley, Johnson, King, Knight, Laws, Lee, Londborg, McCutcheon, McLaughlin, McNees, Marston, Nordale, Poulsen, Riley, R. Rivers, Stewart, Sundborg, Sweeney, Walsh, White, Wien, Mr. President.

Absent: 1 - McNealy.)

CHIEF CLERK: 18 yeas, 36 nays and 1 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 14? Mr. Ralph Rivers.

R. RIVERS: I have an amendment.

PRESIDENT EGAN: Mr. Ralph Rivers, you may offer your amendment. The Chief Clerk may read the proposed amendment.

R. RIVERS: May we have about a two-minute recess? I would like to consult with Mr. Londborg.

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for two minutes.

RECESS

ɔd rarely. Every one counts.

HJR 6

dollars a year by not allowing drug company lobby-

— Bennett F
Napa,

APRIL 8, 1907: *Birth of J. Gerald Williams*

Alaska State Librar

ɪrney General J. Gerald Williams, far right, swearing in a new territorial official in 1949.

ALASKA SCRAPBOOK

This week in Alaska history

J. Gerald Williams, Alaska's last territorial attorney general, was born April 8, 1907, in Fraser, Iowa, northwest of Des Monies. He lived in Wyoming as a youngster, and earned a bachelor's degree at the University of Washington in 1929. He came to Alaska in 1930 and taught school in several parts of the territory, including Southeast, the Interior and Southcentral.

He went back to the University of Washington to earn a law degree, returning to Anchorage in 1942 to serve as assistant U.S. Attorney. He went into private practice in 1943.

The attorney general was a four-year elected office in the territorial period. Williams ran for and won the office in 1949. He was re-elected twice.

Unlike in some other U.S. territories, Congress did not authorize a separate territorial court system for Alaska. A federal district court was created for the territory in 1884, and it remained the court of original jurisdiction throughout the territorial period. Congress did provide legal and criminal code for the territory in 1899. Thus, the federal code of procedure applied in the district court for federal, or district, matters, but the territorial code of civil and criminal procedure applied for "territorial" matters. The distinction was ambiguous, and sometimes confusing.

Williams traveled a great deal as attorney general, more than any other territorial attorney general and perhaps since. Interestingly, he played only a marginal role in the Alaska Constitutional Convention in 1955-56. The Alaska Statehood Committee instead contracted with several Outside research and consulting groups to prepare position and discussion papers on various constitutional provisions.

The new state constitution, adopted by Alaska voters in 1958 and effective with the official onset of statehood Jan. 3, 1959, provided for an appointed attorney general. Because he was elected by the voters in 1956 for a third four-year term, however, Williams was not sure that he should relinquish his office. Acknowledging the superseding jurisdiction of the state, prevailing legal opinion encouraged him to step aside, and he did. He did run unsuccessfully for the Democratic gubernatorial nomination in 1958.

Williams served as a federal bankruptcy referee for Alaska from 1962 until his retirement in 1974. He died May 13, 1992.

■ Alaska Scrapbook is compiled by Steve Haycox, a history professor at the University of Alaska Anchorage.

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Alaska Bar Rules Provisions Applying to Attorneys General

Rule 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, transaction, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public. (SCO 1123 effective July 15, 1993)

ALASKA COMMENT

"Screening" is a procedure used to prevent intrafirm exchange of confidential information. Courts and commentators generally recognize two screening methods -- the "Chinese Wall" and the "cone of silence." When a firm establishes a Chinese Wall, the tainted lawyer is usually separated, both physically and organizationally, from attorneys working on the conflicting matter. The attorney is generally prohibited from having any connection with the case, from receiving any share of the fees attributable to it, and from having access to the files. Other members of the firm are not allowed to discuss the case or share documents with the attorney. Under the "cone of silence" method, the tainted attorney simply agrees not to share information about prior clients with members of the new firm. For a discussion of the "cone of silence" method, see **Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.,** 632 F. Supp. 418, 428 (D. Del. 1986).

COMMENT

This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional

functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing to severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

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Rule 1.13. Organization as Client.

(a) Except as hereinafter provided, a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing a confidence or secret relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16, and shall act in accordance with the provisions of Rule 1.6.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client and that the lawyer's first duty is to the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. (SCO 1123 effective July 15, 1993; amended by SCO 1332 effective January 15, 1999)

ALASKA COMMENT

The additional phrase "except as otherwise hereinafter provided" was added to paragraph (a) in order to emphasize that the lawyer's first duty is to the organization and not to the organization's directors, officers, employees, members, shareholders or other constituents.

In paragraph (c) the Committee added the phrase "in accordance with the provisions of Rule 1.6" in order to specifically delineate the lawyer's options when faced with an act or refusal to act which is clearly in violation of the law and likely to result in substantial injury to the organization.

Paragraph (d) was amended to more clearly delineate the lawyer's obligation to clearly inform the organization's constituents with whom the lawyer is dealing that the lawyer's ultimate loyalty is to the organization.

COMMENT

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents a confidence or secret relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a

circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8 and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such

conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. *See* note on Scope.

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged based on the facts of the case.

Dual Representation

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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Section 4. Vacancies. A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.

Cross references. — For statutory provisions for filling vacancies, see AS 15.40.320—15.40.470.

Section 5. Disqualifications. No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

Revisor's notes. — Senate Joint Resolution No. 2, changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.

Opinions of attorney general. — The purpose of the prohibition is to remove temptation and improper motives from considerations of legislators in voting for increased salaries or the creation of new offices. June 29, 1976, Op. Att'y Gen.

Because prohibitions like this are contrary to general public policy which favors eligibility for office, they are usually given a literal construction and are rarely expanded beyond their literal terms. June 29, 1976, Op. Att'y Gen.

The prohibitions contained in this section are literally and strictly enforced. November 16, 1977 Op. Att'y Gen.

Under Warwick v. State ex rel. Chance, Sup. Ct. Op. No. 1252 (File No. 2712), 548 P.2d 384 (1976), a member of one house of the legislature may run for a seat in the other house, when the pay for that seat in the other house has been increased by the legislature in which the candidated served. June 29, 1976 Op. Att'y Gen.

Reading the prohibition purely literally it does not apply to a legislator's running for a seat in the other house of the legislature. His office, that of a "legislator," remains the same. While the term of office differs (four years for members of the senate, two years for members of the house) and the constituency may differ, the "office" of "legislator" is constant. June 29, 1976 Op. Att'y Gen.

While the supreme court has limited the exceptions to the operation of this section to those expressly made by the Alaska Constitution, no exception is required for a legislator's running for legislative office, because the prohibition has no application and should not be expanded to apply to that situattion. June 29, 1976 Op. Att'y Gen.

Neither a legislator nor the governor may sit as a regent of the University of Alaska while holding office. December 27, 1976 Op. Att'y Gen.

It would not be constitutional for the chairmen of the House and Senate finance committees to be members of the State Bond Committee. November 16, 1977 Op. Att'y Gen.

NOTES TO DECISIONS

The purpose sought to be accomplished by this section is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

The provisions of this section are unambiguous. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

"Appointment" is synonymous with "employment". Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), overruled, But see Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270, 119 L.R.R.M. (BNA) 2720 (Alaska 1985).

"Position of profit". — See Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

And its intent. — The term "position of profit" was intended to prohibit all other salaried nontemporary employment under the United States or the State of Alaska. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

Superintendents of state schools and state school teachers hold positions of profit within the prohibition of this section. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

Restriction not dependent on intent of legislator. — There is nothing in this section making its restriction dependent on the intent of an individual legislator in voting for the bill in question. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

Prohibition applies for the full statutory period regardless of the acts of subsequent legislatures. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

The supreme court does not look to events subsequent to the appointment but to the legality of the appointment itself. If illegal at the time it was made, no subsequent act of a later legislature can make the appointment legal. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

Subsequent action by legislature. — Salary increase enacted by a subsequent legislature did not render moot a case involving the issue of the legality of the original appointment of a legislator to an office the salary of which was increased by the legislature of which he was a member. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

Appointment of former legislator as commissioner of administration. — The clear language of this section proscribed the appointment of a member

Administrative Code. — For governor, see 6 AAC, part 8.

NOTES TO DECISIONS

Applied in State v. Fairbanks N. Star Borough, 736 P.2d 1140 (Alaska 1987).

Cited in Aspen Exploration Corp. v. Sheffield, 739 P.2d 150 (Alaska 1987).

Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Revisor's notes. — Senate Joint Resolution No. 2, "changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, effective October 10, 1970, inadvertently omitted express amendment of this section.

Opinions of attorney general. — Neither custom nor law requires the governor to submit the names of the heads of principal departments to the legislature for confirmation when they carry over in office following a gubernatorial election. January 25, 1979 Op. Att'y Gen.

NOTES TO DECISIONS

Clear nature of provisions. — The provisions of this section and § 26 of this article are clear and unambiguous. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Purpose of section. — This section explicitly empowers the governor to appoint and dismiss the head of each principal department. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

This section subjects executive appointments to confirmation by a majority of the members of the legislature in joint session. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Confirmation is part of executive power of appointment. — Confirmation is not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Limitation on legislative checks on governor's power to appoint. — The lack of ambiguity in this section and § 26 of this article mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointive authority through the legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

This section and § 26 of this article mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

The quorum for a joint session of the legislature convened under Article III, §§ 25 and 26 of the Alaska Constitution is a majority of the members of the legislature, or 31 legislators from either house of the legislature. Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985).

Section 1, ch. 82, SLA 1975, is unconstitutional. — Section 1, ch. 82, SLA 1975, which amends AS 39.05.020 and purports to authorize legislative "meddling" in the exercise of an executive power, i.e., the appointment of executive officials, is unconstitutional because it is violative of separation of powers requirements. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Applied in Larson v. State, 564 P.2d 365 (Alaska 1977); Buckalew v. Holloway, 601 P.2d 240 (Alaska 1979); Kerttula v. Abood, 686 P.2d 1197 (Alaska 1984).

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

NOTES TO DECISIONS

Clear nature of provisions. — The provisions of this section and § 25 of this article are clear and unambiguous. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HJR006-OOG-EO-3-16-07
Bill Version: HJR6
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG

Title: Constitutional amendment relating to the office of attorney general
RDU: Executive Operations
Component: Executive Office

Sponsor: Representatives Crawford and Harris
Requester: House State Affairs Committee
Component No.: 6

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services				*****	*****	*****
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	*****	*****	*****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF				*****	*****	*****
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	*****	*****	*****

Estimate of any current year (FY2007) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, to handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders).

The constitutional amendment proposed by this resolution would be on the 2008 general election ballot. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in 2010. Fiscal impact to the Office of the Governor would begin in FY2011. A fiscal analysis for information purposes is attached.

Prepared by: Gail Fenumiai, Asst. Administrative Director
Phone 465-3885
Division: Division of Administrative Services
Date/Time 3/16/2007, 10:42am

Approved by: Linda J. Perez, Administrative Director
Date 3/16/2007
Agency: Office of the Governor, Division of Administrative Services

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HJR 6
2007 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

The fiscal impact below is for **illustration purposes** only and is based on 2007 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY2011, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined and may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions - an attorney, rg. 26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned space would be available and does not include lease costs.

Personal services:	three PFTs	288.0
Contractual:	comm., phones, tolls courier svcs., subscipts, etc.	21.1
Supplies:	office/library supplies	10.8
	Total estimated annual costs:	319.9

Additional first year set-up costs:

Equipment:	office furniture,DP and communication equipment	43.5*

* 43.5 first year set-up costs only and not included in annual estimate

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Alaska State Legislature

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March 9, 1995

MEMORANDUM

TO:

FROM: Gordon S. Harrison, Director

RE: **Issue of An Elected Attorney General In Alaska**
Research Request 95.150

You asked for background information on the issue of electing the attorney general in Alaska, in contrast to the present practice of the governor appointing the attorney general. This memorandum briefly discusses the existing constitutional structure of the executive branch and the attorney general as an appointed department head; past efforts to change this constitutional scheme; a summary of the case for and against an elected attorney general; and the current controversy of the role of the attorney general in the recent withdrawal of the state's appeal in the *Babbitt* lawsuit against the federal government.

Constitutional Structure of the Executive Branch, and the Appointed Attorney General

Article III, Section 24 of the Alaska Constitution states, in full:

> Each principal department shall be under the supervision of the governor.

Article III, Section 25 states, in pertinent part:

> The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor . . . .

These two brief constitutional provisions create in Alaska a unified executive branch of government. Unlike the situation in most other states, in Alaska the heads of major executive

branch agencies are appointed and serve at the governor's pleasure: only the governor and lieutenant governor are popularly elected.[1]

The constitution gives to the legislature the power to determine the number of principal departments and the duties of each. It established the Department of Law as one of 16 principal departments in the executive branch, including the Office of the Governor (AS 44.17.005). The attorney general is the head of the Department of Law (AS 44.23.010), and therefore, the person serving in that position is appointed by the governor and serves at the governor's pleasure as do the other department heads.[2] The state constitution would have to be amended to select the attorney general by popular election.

This constitutional scheme was adopted by the delegates to the constitutional convention to avoid the fragmentation of executive authority that results from independently elected department heads. They wanted the executive branch to be *efficient* in its operation and the governor to be *accountable* to the voters for the performance of the executive agencies. They gave the governor the power necessary to manage the administrative agencies, and they expected the governor to answer for his or her management. The delegates were firmly committed to the principle of a strong and accountable governor, and they rebuffed several efforts to weaken the governor's control over the attorney general, including proposals to elect the attorney general. Speaking on the floor of the convention against such a proposal, delegate McLaughlin stated:

> If we yield in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory [of the strong executive]. . . .[3]

Delegate Ralph Rivers, who said he was initially inclined to support the idea of an elected attorney general, argued strenuously against it. He said he came to realize that:

> . . . if you are going to let the governor's administration be held responsible for the conduct of that administration, you have got to at least give the governor an attorney general of his own choice. Under [the proposal for an elected

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[1]The lieutenant governor has no constitutional powers and few statutory powers.

[2]The Department of Education is an exception to this scheme. Under the grant of authority in Article III, Section 25, to determine *by law* whether the head of each department shall be a single executive or otherwise, the legislature has decided to place a board at the head of this department. The method of selecting the executive officer of this department is provided in Article III, Section 26.

[3]*Proceedings of the Alaska Constitutional Convention*, p. 2196. Both Delegate Rivers and McLaughlin were attorneys.

> attorney general] he might get an attorney of the opposite political faith. He might get one of his own party who is either inadequate or who is hostile to him. . . .In either case, the governor could say at the end of his term, if things haven't gone well, "We had a good program but that attorney general you foisted upon me wrecked our program."[4]

This proposal for an elected attorney general, which took the form of an amendment to the committee recommendation for appointed department heads, was defeated on the floor of the convention by a vote of 40 to 12. A subsequent proposal to have the judicial council screen candidates for the post of attorney general was defeated by a vote of 36 to 18. The delegates clearly wanted the state attorney general to be appointed by, and serve at the pleasure of, the governor.

Proposed Constitutional Amendments Creating an Elected Attorney General

Although the matter was settled in the constitution, it was not settled in the minds of some people, and support for an elected attorney has lingered. A resolution was introduced in the first state legislature to amend Article III of the constitution to elect the attorney general, and some 26 resolutions have been introduced over the years to the same end.[5] However, none of these measures has received the necessary two-thirds majority vote to be placed on the ballot for ratification.

Arguments For and Against An Elected Attorney General

Proponents of an elected attorney general believe that the independent legal judgment of an appointed attorney general is compromised by his or her political ties to the governor. Accordingly, an elected attorney general is thought to bring an objective legal perspective to the office. There are at least two sources of "political" pressures to which the appointed attorney general is susceptible. These are the pressures (tacit if not expressed) to treat favorably campaign contributors, special interests aligned with the governor, and various electoral allies, and the less insidious but more pervasive pressures to provide contrived legal support for the governor's

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[4]*Proceedings*, p. 2198

[5]The most recent resolution proposing an elected attorney general was Senate Joint Resolution 12, 14th legislature (1985-86). At least one bill was introduced to hold a statewide advisory vote on the question of electing the attorney general (House Bill 456, 13th legislature, 1983-84). Resolutions have also been introduced from time to time to provide for the election of district attorneys.

programs, policies, and legislation. It should be noted that sensitivity of legislators to these concerns was far more acute in earlier years when the legislature did not have its own counsel and relied exclusively on the attorney general for legal advice. In this situation, when questioning the legality of a bill proposed by the governor, or when seeking defense of a legislator's bill that the governor alleges is illegal, legislators would have preferred to hear from an elected attorney general rather than a lawyer from the governor's cabinet. With their own legal staff to turn to, legislators today are no longer dependent upon legal advice from a source that has conflicting interests.

Defenders of the constitutional status quo point out that an elected attorney general would not be free from political influences but merely substitute his or her own for those of the governor. An elected attorney general is a politician no less than the governor, and must raise campaign funds for a statewide contest and cultivate electoral favor wherever it can be found. Furthermore, experience shows in states with an elected attorney general that the office is often a stepping stone for the governor's office. Thus, the elected attorney general is very likely to be an ambitious politician, and it is not unusual for an attorney general to run against the governor in whose administration he serves. Under these circumstances there is no reason to expect more objective and independent legal judgment from an elected attorney general than from an appointed one.

Defenders of the status quo also see wisdom in the original constitutional design of the executive branch, which does in fact result in efficient administration and political accountability. Under the current system, when things go awry the governor cannot dodge responsibility by blaming others. Finally, advocates of an appointed attorney general argue that the state is more likely to be served by a person of legal competence and talent if that person is appointed rather than elected.

An Elected Attorney General and the *Babbitt* Lawsuit

We presume that the current interest in the role of the attorney general in Alaska has been generated by the decision of Governor Knowles to withdraw the state's appeal in the lawsuit *Alaska v. Babbitt*. Questions arose about the duties and responsibilities of the attorney general in this case because the same person, Bruce Botelho, both filed the suit as attorney general for Governor Hickel and withdrew it as attorney general for Governor Knowles. It has been suggested by people who disagreed with the decision to drop the appeal that an elected attorney general would have been compelled to defend the state's vital interest and continue the appeal, notwithstanding the governor's desires. This proposition deserves some discussion, even though a definitive response is not possible. It is conceivable that an elected attorney general would have acted differently from Attorney General Botelho in the *Babbitt* suit, but there are strong reasons to think he might not have. The outcome in any particular hypothetical case would, of course, depend on many factors, including the political values of the elected attorney general as well as the precise terms of the constitutional and statutory provisions that established the elected office of attorney general in Alaska. Generally speaking, however, it is understood that elected attorneys

general defend the positions of executive officers and agencies if those positions are reasonable and formulated by a defensible process. In matters of public policy, where the best interests of the state are at issue rather than the legality of a position, the attorney general is usually expected to defer to the governor:

> There is no reason to assume that the attorney general can ascertain the public interest better than the governor, who is elected in the same statewide election but indisputably attracts more interest and attention than the attorney general.[6]

The California Supreme Court, in *The People ex rel. George Deukmejian v. Brown*, 624 P 2nd. 1206 (1981), held that, under state constitutional provisions similar to those in Alaska regarding the governor's supervisory powers over the executive branch:

> . . . if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

The court's decision in this case is attached. The majority decision and the dissent, although presented in the context of California constitutional law, are suggestive of the broader issue of the extent of the common law powers of attorneys general to safeguard the public interest.

One must bear in mind that governors and elected attorneys general have a mutual interest in avoiding public spats. Therefore, as a practical matter, potential for conflict over the *Babbitt* appeal would doubtless have been perceived by the governor and the elected attorney general and a contest between them avoided by negotiation (tacit or overt). Thus, the outcome in the *Babbitt* controversy under our hypothetical situation could have gone either way--appeal or not appeal--on the basis of political judgments by the two key players.

Questions concerning the powers and duties of elected attorneys general, and the advantages and disadvantages of an elected position versus an appointed position, are very complex, and they are treated only in cursory fashion in this memorandum. If you would like additional information, or additional reading material on the subject, please let us know.

Attachments

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[6]Scott M. Matheson, Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy*, Fall, 1993, p. 15.

172 Cal.Rptr. 478

The PEOPLE ex rel. George DEUKMEJIAN, as Attorney General, etc., Petitioner,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24252.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Attorney General sought peremptory writ of mandate to compel State Personnel Board, Public Employment Relations Board, Governor, and Controller to perform their statutory and constitutional duties with regard to recently enacted State Employer-Employee Relations Act. The Supreme Court, Mosk, J., held that Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy.

Petition dismissed.

Richardson, J., dissented and filed an opinion.

See also Cal., 172 Cal.Rptr. 487, 624 P.2d 1215.

1. Attorney General ⇐6

Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy. West's Ann.Gov. Code, § 3512 et seq.

2. Attorney General ⇐6

Attorney General cannot be compelled to represent state officers or agencies if Attorney General believes them to be acting contrary to law, and may withdraw from statutorily imposed duty to act as their counsel, but may not take position adverse to those same clients. West's Ann. Gov.Code, §§ 11040, 12512.

3. Attorney General ⇐6

Where a conflict between Governor and Attorney General develops over faithful execution of laws of the state, Governor retains supreme executive power to determine public interest; Attorney General may act only subject to powers of the Governor. West's Ann.Const. Art. 5, §§ 1, 13.

4. Attorney General ⇐6

Governor could raise issue of violation of rule of professional conduct by motion in case before court to enjoin adverse representation of Attorney General; overruling *People v. Johnson*, 6 Cal. 499.

George Deukmejian, Atty. Gen., Willard A. Shank and N. Eugene Hill, Chief Asst. Attys. Gen., L. Stephen Porter and Richard D. Martland, Asst. Attys. Gen., Talmadge R. Jones, George J. Roth, Robert Burton, Paul H. Dobson and M. Anthony Soares, Deputy Attys. Gen., for petitioner.

John C. Wakefield, Los Angeles, Larry C. Larsen, Gilles Attia, A. J. Weiglein, Sacramento, A. Roger Jeanson, Haas & Najarian, San Francisco, Thomas A. Farr and Rex H. Reed, Springfield, Va., as amici curiae on behalf of petitioner.

Tuttle & Taylor, Raymond C. Fisher, Barbara L. Stocker, Jeffery M. Hamerling, Los Angeles, J. Anthony Kline, San Francisco, Byron S. Georgiou, San Diego, Barbara T. Stuart, Sacramento, Jerome B. Falk, Jr., Steven L. Mayer, Howard, Prim, Rice, Nemerovski, Canady & Pollak, San Francisco, Barry Winograd, Salinas, Kristin Jensen, Robert Miller, William P. Smith, Terry

Filliman, Sacramento, Gerald Becker, Martinez, and Ronald Blubaugh, Sacramento, for respondents.

Loren E. McMaster, Bernard L. Allamano, Gary P. Reynolds, Sacramento, Richard Lobel, Van Bourg, Allen, Weinberg & Roger, Stewart Weinberg and Robert J. Bezemek, San Francisco, for intervenors.

Reich, Adell, Crost & Perry, Hirsch Adell, Charles P. Scully, Donald C. Carroll, Charles P. Skully, II, Donald H. Wollett, Ronald Yank, Franklin Silver, Carroll, Burdick & McDonough, Bodkin, McCarthy, Sargent & Smith, Timothy J. Sargent, Kevin W. Horan, Los Angeles, Gillin, Jacobson & Wilson, Ralph L. Jacobson and Cynthia T. Podren, Berkeley, as amicus curiae on behalf of intervenors.

MOSK, Justice.

Before reaching the merits of this litigation in either this case or the companion case of *Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 172 Cal.Rptr. 487, 624 P.2d 1215, we address a motion of the Governor to dismiss the petition of the Attorney General herein.

The chronology of events is significant. The 1977 Legislature adopted a State Employer-Employee Relations Act (SEERA). (Gov. Code, §§ 3512-3524.) While the Governor had the measure under consideration the then-Attorney General wrote to him under date of September 20, 1977, urging him to sign what he described as "a standard, well-accepted, existing method of resolving labor/management disputes . . . a good step forward." Ten days later the Governor signed the measure into law, and it became effective on July 1, 1978.

On January 23, 1979, the Pacific Legal Foundation and the Public Employees Service Association filed in the Court of Appeal an original petition for a writ of mandate to compel the Governor, the Controller, the Public Employment Relations Board, and the State Personnel Board to perform their constitutional and statutory duties without regard to provisions of SEERA, contending the legislation was unconstitutional.

On January 30, 1979, the present Attorney General, acting through two deputies, met with members of the State Personnel Board, which had been served with summons in the Pacific Legal Foundation suit. At the conference the Attorney General, as counsel to the board, outlined the legal posture of the board and described four legal options available to it. This was a classic attorney-client scenario.

At all times up to that point, the Attorney General was by law the designated attorney for the Governor and the State Personnel Board, as well as for the other state officers and agencies involved herein. Government Code section 12511 provides that the "Attorney General has charge, as attorney, of all legal matters in which the State is interested . . . ." Section 12512 provides that the "Attorney General shall . . . prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; . . . ." (See also Gov. Code, § 18656.)

On February 7, 1979, however, the Attorney General initiated the present proceeding by filing an independent petition for writ of mandate in the Court of Appeal against the Governor and other state agencies, asking for relief comparable to that sought by Pacific Legal Foundation.

[1] There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel. (Gov. Code, § 11040; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 15, 112 Cal.Rptr. 786.) The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

The rules of professional conduct to guide attorneys in their relationship with clients

and former clients are well established and generally understood by all attorneys in this state. Rule 5–102 of the State Bar Rules of Professional Conduct (3B West's Ann. Bus. & Prof. Code (1974 ed., 1980 cum. supp.) foll. § 6076, at p. 92) requires that before an attorney may represent interests adverse to a client, he must obtain his client's consent in writing. For violation of this principle with regard to a *former* client, an attorney has been disciplined by the State Bar. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 23 P.2d 291.) This court declared in *Galbraith* that "the subsequent representation of another against a former client is forbidden not merely when the attorney *will* be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he *may* be called upon to use such confidential information." (Italics in original; *id.* at pp. 332-333, 23 P.2d 291.)

We took similar disciplinary action in *Hawkins v. State Bar* (1979) 23 Cal.3d 622, 629, 153 Cal.Rptr. 234, 591 P.2d 524, despite the attorney's claim that his conflicting relationship with another person arose subsequently to the initial legal consultation with his client. The relationships, we found, "arose contemporaneously"; this is comparable in time span to the chronology here between the Attorney General's legal consultation with the Personnel Board and his filing of a lawsuit against the same board.

Conduct of attorneys has also been discussed in contexts other than State Bar discipline. In *Watchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573–574, 15 P.2d 505, this court declared that "an attorney is forbidden to do *either* of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (Italics added.) While the record here does not reveal whether the Attorney General acquired any knowledge or information from his clients, the prohibition is in the disjunctive: he may not use information *or* "do anything which will injuriously affect his former client." Unquestionably the Attorney General is now acting adversely to the position of his statutory clients, one of which consulted him regarding this specific matter.

In *Grove v. Grove Valve & Regulator Co.* (1963) 213 Cal.App.2d 646, 653, 29 Cal.Rptr. 150, the court enjoined an attorney from appearing against his former clients because "there can be no reasonable doubt that Flehr's present employment as attorney for appellant in this action is adverse to the interests of his former clients, since appellant is suing them over matters which are related to and which Flehr became conversant with during [illegible] period in which he represented respond[illegible] as their attorney." Here, too, the Att[illegible]y General is suing former clients over [illegible]tters that arose during the period when by law he was counsel for those same clients.

To the same effect is *Earl Scheib, Inc. v. Superior Court* (1967) 253 Cal.App.2d 703, 706, 61 Cal.Rptr. 386, in which the court declared "The rules which underlie our decision have long been written in the books so that he who runs might read. 'It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.' (Bus. & Prof. Code, § 6068.) 'A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.'" (See also *Anderson v. Eaton* (1930) 211 Cal. 113, 116, 293 P. 788.)

In *State of Ark. v. Dean Foods Products Co., Inc.* (8th Cir. 1979) 605 F.2d 380, 384, it was held that the "attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Disqualification of the Attorney General was upheld because of his prior representation of a litigant; whether he "did in fact receive

confidential information is irrelevant, the policy considerations of the Code precluding that inquiry." (*Id.*, p. 386.) The same doctrine was enunciated in *General Motors Corporation v. City of New York* (2d Cir. 1974) 501 F.2d 639, 648, and *Emle Industries, Inc. v. Patentex, Inc.* (2d Cir. 1973) 478 F.2d 562, 571. Also see Kramer, *Appearance of Impropriety* (1980) 65 Minn.L. Rev. 243, 255.

[2] But, contends the Attorney General, he is not bound by the rules that control the conduct of other attorneys in the state because he is a protector of the public interest. We have acknowledged "the Attorney General's dual role as representative of a state agency and guardian of the public interest." (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d at p. 15, 112 Cal.Rptr. 786.) The Legislature has impliedly recognized that a conflict might arise because of that duality by giving the Attorney General the right to withdraw from representation of his statutory clients and to permit them to engage private counsel. (Gov. Code, § 11040.) We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients.[1]

The Attorney General insists nevertheless that he has a common law right, undefined and unrestrained, to sue in his role as "the People's legal counsel" the Governor and other public officials and agencies. This claim presupposes that the Attorney General may determine, contrary to the views of the Governor, wherein lies the public interest. While there is no question that we may consider common law practices, we may do so only if they are not superseded by or in conflict with constitutional or statutory provisions. (*People v. New Penn Mines, Inc.* (1963) 212 Cal.App.2d 667, 28 Cal.Rptr. 337.) In this instance the Constitution—the highest indicator of the public interest—is both apposite and unambiguous.

[3] Article V, section 1, of the California Constitution provides that "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." Article V, section 13, defines the powers of the Attorney General inter alia in this manner: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." The constitutional pattern is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

Consistent with the Constitution, Government Code section 12010 provides: "The Governor shall supervise the official conduct of all executive and ministerial officers." (*Spear v. Reeves* (1906) 148 Cal. 501, 504, 83 P. 432.) The Attorney General is an executive officer who "shall report to the Governor the condition of the affairs of his office" (Gov. Code, § 12522).

We recognize there are cases in other jurisdictions that permit their attorneys general to sue any state officer or agency, presumably without restriction. Such opinions arise, however, under the peculiarities of the prevailing law in those several states, and are not persuasive here. (See, e. g., *Conn. Com'n. v. Conn. Freedom of Information* (1978) 174 Conn. 308, 387 A.2d 533); *Feeney v. Commonwealth* (1977) 373 Mass.

1. *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 138 Cal.Rptr. 532, is not to the contrary. There the lawsuit was brought by the assessor but not as a public official; he sued the county supervisors "individually and as a taxpayer." (*Id.* at p. 27, 138 Cal.Rptr. 532.) Therefore the court held the county counsel could represent the supervisors in defending the lawsuit.

359, 366 N.E.2d 1262; *E.P.A. v. Pollution Control Bd.* (1977) 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

On the other hand, several jurisdictions have prevented the attorney general from acting without constitutional or statutory authority. A federal court found it incongruous for an attorney general, purporting to act for the people, to mount "an attack by the State upon the validity of an enactment of its own legislature." (*Baxley v. Rutland* (D.Ala.1976) 409 F.Supp. 1249, 1257; see also *Hill v. Texas Water Quality Bd.* (Tex.Civ.App.1978) 568 S.W.2d 738; *Motor Club of Iowa v. Dept. of Transp.* (Iowa 1977) 251 N.W.2d 510, 515; *People ex rel. Witcher v. District Court, etc.* (1976) 190 Colo. 483, 549 P.2d 778; *Garcia v. Laughlin* (1955) 155 Tex. 261, 285 S.W.2d 191, 194; *State v. Hagan* (1919) 44 N.D. 306, 175 N.W. 372, 374; *State v. Huston* (1908) 21 Okl. 782, 97 P. 982, 989.)

Arizona, the constitution of which, like ours, declares that its governor "shall take care that the laws be faithfully executed" (Ariz.Const., art. V, § 4), reached the same conclusion as we do herein. In *Arizona State Land Department v. McFate* (1960) 87 Ariz. 139, 348 P.2d 912, 918, the supreme court of that state declared in an unanimous opinion, "Significantly, these powers are not vested in the Attorney General. Thus, the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."

The Arizona court further observed, with regard to a suit by the attorney general against a state agency: "Two propositions flow generally from this conception, embodied in our statutes, of the basic role of the Attorney General as 'legal advisor of the departments of the state' who shall 'render such legal services as the departments require' [citation]: the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor; and the initiation of litigation by the Attorney General in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of this role." (*Id.* 348 P.2d at p. 915)

We are not unmindful that the Attorney General may have injected himself into the litigation initiated by Pacific Legal Foundation with the public interest in mind as he perceives it. We discussed a comparable circumstance in *Anderson v. Eaton*, supra, 211 Cal. at page 116, 293 P. 788: "Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

[4] Finally, we conclude that Governor has chosen a proper remedy. It has been held that one way "in which the issue of a violation of the rule [of professional conduct] may be raised is by a motion by the former client in the case before the court to enjoin the adverse representation." (*Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919, 927, 75 Cal.Rptr. 580, and cases cited.) To the extent *People v. Johnson* (1856) 6 Cal. 499, permitted the Attorney General to sue the Governor, it is disapproved.

For the reasons stated, we enjoin the Attorney General from proceeding in this matter and order that the alternative writ be discharged and the petition be dismissed.

BIRD, C. J., and TOBRINER and NEWMAN, JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent, and regret today's majority opinion. It may well serve to de-

prive the office of the Attorney General of its traditional authority to initiate judicial proceedings which challenge the constitutional basis for procedures which are undertaken or threatened to be undertaken by public officials, including the Governor, when the Attorney General reasonably and in good faith believes such procedures to be defective. The Attorney General's traditional watch-dog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government. Their loss would deprive the people of a first line of protection against improper executive conduct in appropriate cases. I trust that courts, including ours, will in the future narrowly limit the applicability of today's decision.

In the consolidated proceedings presently before us, petitioners have challenged the constitutional basis for the State Employer-Employee Relations Act (SEERA). (Gov. Code, § 3513.) In the instant cause—one of the consolidated proceedings—the Attorney General appears as petitioner on behalf of the People of the State of California. The majority do not reach in their opinion the substantive merits of the Attorney General's petition, but examine only a motion by respondent Governor to dismiss the petition on the ground that Attorney General is disqualified from filing it. Only that same limited issue is addressed in this dissenting opinion After the relief sought by petitioners in the consolidated cases was ordered by the Court of Appeal, the Governor petitioned this court for hearing and simultaneously moved "to have the Court ... dismiss the Attorney General's petition and to disqualify the Attorney General from any further participation in those proceedings." This issue was argued before the court in conjunction with argument on the substantive merits.

SEERA purports to provide for collective bargaining for state civil service employees as to wages, hours and other terms and conditions of state employment. However, it is also provided in California Constitution, article VII (formerly art. XXIV) that the State Personnel Board (SPB) shall administer a civil service system of appointments and promotions, the fixing of probationary periods and classifications, the adoption of rules authorized by statute, and the review of disciplinary actions affecting employees of the state. The substantive question thus at issue but not here examined is whether the constitutional role of the SPB preempts the setting of salaries of civil service employees and, if so, whether SEERA infringes on such constitutionally vested authority. It is the Attorney General's position that the jurisdiction of the SPB to prescribe classifications for civil service positions is so integrally bound up with the setting of salaries that the legislative attempt through SEERA to subject the salary-setting function to the bargaining process conflicts with article VII.

We have said recently that, "The Attorney General ... is the chief law officer of the State (Cal.Const., art. V, § 13). As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations omitted.] '[H]e represents the interest of the people in a matter of public concern.' [Citation omitted.] Thus, 'in the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.' [Citation omitted.] Conversely, he has the duty to defend all cases in which the state or one of its officers is a party. (Gov.Code, § 12512.) In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state or one of its agencies or officers." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14–15, 112 Cal.Rptr. 786.)

In view of our foregoing description of the Attorney General's unique representative capacities which clearly distinguishes him from attorneys generally, no claim is

now made by anyone that the Attorney General cannot seek a judicial declaration of the invalidity of SEERA on constitutional or other grounds. In fact, the Attorney General not only has the right but an obligation to present what he deems to be in the public interest in the face of potential conflicts with state agencies which he nominally represents. "In the exceptional case the Attorney General, *recognizing that his paramount duty to represent the public interest cannot be discharged without conflict may consent to the employment of special counsel by a state agency or officer.* (See Gov.Code, § 11040.)" (*D'Amico, supra*, at p. 15, 112 Cal.Rptr. 786, italics added.) Nor can there be any question but that the Governor is the chief executive officer of the state and that in the performance of the Governor's executive function the Attorney General is his subordinate.

However, a state Attorney General is more than a mere appendage to a Governor's office. As our description in *D'Amico* makes abundantly clear, the Attorney General is an independent constitutional officer vested with very broad powers derived from both common law and statutory origins. He is far more than a tail on the Governor's kite. It would be a serious breach on the part of an Attorney General if he or she failed to challenge a legislative enactment which he or she believed with good cause to lack constitutional basis, even though the enactment was then actively supported by a Governor. Such a challenge is not an act of insubordination proscribed by the language of article V, section 13 of the Constitution providing that as "chief law officer of the state" the Attorney General is "[s]ubject to the powers and duties of the Governor." All powers and duties, including those of the executive, are limited by the lawful exercise thereof, and the Attorney General cannot be constrained seeking a judicial pronouncement of the la... ilness of legislation which the Governor would implement. If the Governor could impose such limitations on the Attorney General—as in this case by precluding a constitutional challenge to SEERA—then the Attorney General would not be able to test or challenge any enactment without executive approval, and the system of checks and balances envisioned by the Constitution would fail. Such a conceptual paralysis is unthinkable, of course, and the majority, fortunately, do not urge this position.

Notwithstanding the foregoing, the majority concludes that in the particular circumstances of this case the Attorney General has conducted his office in a manner which disqualifies him, thus leaving the public interest without any representation in these proceedings. The disqualifying conduct is said to deny respondents a fair opportunity to litigate issues on the merits because of advantages gained by the Attorney General through his relationships to some or all of respondents. The challenged conduct consists of (1) a letter sent by the Attorney General on September 20, 1977, to the Governor urging him to sign the legislation (Sen. Bill No. 839) enacting SEERA into law, (2) a conference between deputy attorneys general and representatives of the SPB on January 30, 1979, at which the deputies urged the invalidity of SEERA and sought SPB support in seeking a judicial declaration thereof, and (3) utilization of those same deputies who had previously represented SPB to prosecute the instant proceedings.

The letter is of little significance. Although former Attorney General Younger urged the Governor to sign Senate Bill No. 839, it is clear that because the Governor had been active in procuring the legislation he would sign it independently of the Attorney General's recommendation. The content of the letter deals with continuing efforts by public employees to gain some participation in the determination of their working conditions and compensation, noting that "some public employees tend to believe their only effective tool to get proper attention is to strike." While the letter does not address constitutional or other legal issues, it concludes that the "bill will assist greatly in resolving [existing] grievances."

The letter may well be viewed as an effort finally to confront issues which must

be resolved in the event that collective bargaining by state employees is implemented. These proceedings are a step in such resolution. The Attorney General's letter seeks to move these long-standing issues toward a final resolution without addressing the issue of constitutional infirmities, if any, in the legislation.

The Attorney General-SPB conference of January 30, 1979, was called by the Attorney General's office following commencement by Pacific Legal Foundation (PLF) of the proceedings now consolidated with the instant cause. Present at the meeting were members of SPB and its executive officers. The Attorney General was represented by Deputies Talmadge Jones and Stephen Porter. Mr. Jones noted the PLF action in which SPB was named a respondent, and stated SPB had four options in response thereto: (1) to join PLF in urging the unconstitutionality of SEERA, (2) to remain a respondent but to agree nonetheless that SEERA is unconstitutional, (3) to remain a respondent but to take a "noncommittal" position as to the constitutionality of SEERA, or (4) to defend the constitutionality of SEERA. The deputies recommended the first option. They asserted this was the unanimous view of those in the Attorney General's office who had considered the matter, and that SPB's concurrence would add weight to that view in court proceedings because of SPB's administrative expertise in concerned areas.

SPB deliberated the matter in executive session. It unanimously concluded to remain a respondent and to continue to assert the constitutionality of SEERA. When so advised, the deputies suggested the Attorney General might initiate an independent action challenging the constitutionality of SEERA. While representatives of the Attorney General's office did not meet with other respondents, within a few days of the meeting with SPB the Attorney General informed by letters to the Governor, the Controller and the SPB that in the Attorney General's view SEERA was unconstitutional and that he would commence an independent action for a judicial declaration. The Attorney General consented in the letters to the use of other counsel by the addressees. (Gov.Code, § 11040.)

There was no impropriety in the conduct of representatives of the Attorney General in meeting with SPB. The representatives did no more than inform SPB of the Attorney General's opinion concerning the constitutional invalidity of SEERA, seek the support of SPB and advise of the possibility of an independent action by the Attorney General. Indeed, the Attorney General acted well within his duties and responsibilities in asserting an opinion that SEERA was unconstitutional. His nonjudicial opinions are "accorded great respect by the courts." (*Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 752, 493 P.2d 1154.) The most relevant court decision then appeared to support his conclusion. (See *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal. App.3d 52, 56, 143 Cal.Rptr. 393.) The merits of the constitutional issue were neither stated nor discussed. The Attorney General sought no information from, and none was given by, SPB other than its status as a party in the action or actions. The Attorney General forthrightly stated his position and reasons for approaching SPB. He gained no advantage and SPB suffered no disadvantage or prejudice. This has been conceded by all parties to the action.

The final claim of misconduct is likewise wholly without significance. The fact that deputies who had earlier represented SPB are active in prosecuting the Attorney General's action against SPB and others raises no issue of a breach of confidence. The Attorney General's position on the merits in these proceedings was made clear at the outset and we are referred to neither specific advantage gained nor confidence breached. Again, this has been conceded by the parties.

In asserting disqualification the Governor relies on rules 4-101 and 5-102(B), Rules of Professional Conduct. Rule 4-101 provides: "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client,

relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client." Certainly no one can claim in good faith that the Attorney General obtained confidential information by directing his September 20 1977, letter to the Governor. In requesting and attending the January 30, 1979, conference with SPB, and in utilizing the deputies who had participated in that conference to conduct these proceedings, the Attorney General neither sought to gain nor gained, directly or indirectly, any confidential information.

The reason for the foregoing meeting becomes clear from a communication to the Court of Appeal by the Attorney General four days before the meeting with SPB. In seeking an extension of time to respond to the PLF petition, the Attorney General stated that the petition raised potential conflicts of interest among the various respondents, and that neither these conflicts nor representations by the Attorney General of the various respondents, had been resolved. The SPB meeting was essential to the Attorney General's determination of which, if any, agencies and offices he could represent. The office of the Attorney General approached SPB first as most likely to agree with PLF because SPB had only one year earlier forcefully argued its exclusive constitutional right to deal with the fixing of salaries for state employees. (See *Fair Political Practices Com. v. State Personnel Bd.*, supra, 77 Cal.App.3d at p. 56, 143 Cal. Rptr. 393.) The Attorney General thus had sound reason to believe SPB would join him in rejecting SEERA.

I find it significant that SPB itself raises no claim that—because of the conference or the prior representation by certain deputies—a confidence has been breached or that there is any impropriety in the Attorney General's conduct and participation in these proceedings. The Governor's reliance on cases dealing with disqualification of private attorneys pursuant to rule 4-101, is misplaced. When a public attorney is required by law to fulfill his legal duty of representing public officials or agencies in exercising exclusive control of civil litigation, the usual attorney-client relationship does not prevail within the reasonable meaning of rule 4-101. (*Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 34, 138 Cal. Rptr. 532.) In similar fashion it has been held that a county counsel was not disqualified from representing in their official capacities county officials sued by the county assessor—whom the county counsel had previously represented—for defamation and violation of civil rights. (*Ward v. Superior Court*, supra, at p. 34, 138 Cal.Rptr. 532.)

As an *alternative ground* for the holding in *Ward* that "no attorney-client relationship existed between the county counsel and [the county assessor] within the meaning of rule 4-101," the court further observed: "The purpose of rule 4-101 forbidding an attorney from accepting employment adverse to a former client is to protect the former confidential relationship. Thus the rule does not apply where an attorney accepts employment adverse to a former client if the matter bears no relationship to confidential information acquired by the attorney as a result of the former attorney-client relationship." (*Id.*, at p. 34, 138 Cal.Rptr. 532.) Accordingly, the Governor's complete failure to establish that any confidences obtained by the Attorney General in his former attorney-client relationships bear on the merits in these proceedings is thus fatal to the motion for disqualification pursuant to rule 4-101. In fact, the issues raised on the merits of these proceedings are pure issues of law, the only question being whether a legislative enactment infringes on a constitutional proscription. There is no "confidential information" in the possession of respondents which—whether or not conveyed to the Attorney General—might have any bearing on resolution of these constitutional issues.

For reasons similar to those which render inapplicable rule 4-101 in the circumstances of these proceedings, rule 5-102(B) is also not controlling. This latter rule provides that a "member of the State Bar shall not represent conflicting interests, except with the written consent of all parties con-

cerned." The Attorney General is not, of course, representing conflicting interests in these proceedings. While it is true that he has represented or now represents clients whose interests are in conflict with those of the Attorney General as representative of the public interest, such conflicts are inherent in the applicable law pursuant to which the Attorney General must conduct himself. In his "dual role as representative of the state agency and guardian of the public interest" (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d 1, at p. 15, 112 Cal.Rptr. 786), he may be called upon to make determinations and decisions which, while consistent with the interests of one "client," are in conflict with those of another. In such a case he must serve "his paramount duty to represent the public interest," withdraw from his other representations and consent to their employment of special counsel. (*Id.*) The Attorney General has conducted himself accordingly. Indeed, it is difficult to chart a course of conduct more consistent with legal requirements than that engaged in by the Attorney General whom the Governor seeks to disqualify.

The Governor's assertion that rule 5-102(B) is applicable to the Attorney General in these circumstances, if correct, would result in the disqualification of the Attorney General in every instance where he had—prior to taking action against a public official or agency guilty of some illegal or misfeasance—represented or counseled that official or agency on an independent matter. It is manifest that rule 5-102(B) is not intended to so handcuff the official who is constitutionally described as the "chief law enforcement officer of the state" and who frequently is the sole representative of the public interest. The Attorney General's role, being grounded in the common law (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d, at p. 14, 112 Cal.Rptr. 786), is thus similar to that role fully recognized in sister states. Thus, the Supreme Court of Massachusetts has held that the Attorney General, in exercising his "'common law duty to represent the public interest'" in a manner contrary to dictates of a public agency he normally represents, is not to be "constrained by the parameters of the traditional attorney-client relationship." (*Feeney v. Com.* (1977) 373 Mass. 359, 366 N.E.2d 1262, 1266; see also *Conn. Com'n v. Conn. Freedom of Information* (1978), 174 Conn. 308, 387 A.2d 533, 537 ["This special status of the attorney general—where the people of the state are his clients—cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office."]; *E. P. A. v. Pollution Control Bd.* (1977), 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

The record establishes that the Attorney General has conducted himself with the professionalism required of his office, particularly in view of the usual difficulties attending a transition which occurred in that elective office in January 1979. No cause appears for his disqualification, which would thereby deprive the people of any legal representation in these important proceedings.

The Governor's motion should be denied.

Rehearing denied; RICHARDSON, J., dissenting.

172 Cal.Rptr. 487

PACIFIC LEGAL FOUNDATION et al., Petitioners,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24168.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Public interest law organization and employee organization sought peremptory

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The Alaska Attorney General: Elected or Appointed?

by Norman C. Gorsuch

The office of state attorney general can either strengthen or check the executive branch. The Alaska attorney general plays a significant role in public policy-making. Currently, Alaska's governor appoints the state attorney general, and until the argument about the range of executive power is settled, the controversy about the the office's election or appointment will persist.

A History and Description of the Office of the Attorney General

The first office of the attorney general was created in 1461 when the King of England appointed a person to direct all of his representatives who appeared in the royal courts. The common law decisions of these courts defined the attorney general's duties, which, in essence, were to protect the royal property, prerogatives, and revenue, and to prosecute those persons accused of committing crimes. Examples of these duties included recovering for damages done to royal property, regulating public charities and trusts, repealing grants and patents, and prosecuting misdemeanor and felony crimes. By 1700, the attorney general was accorded membership in Parliament to explain crown legislation. [1]

When the American Colonies were settled, colonial attorneys general were appointed by the royal governors and were deemed to exercise all of the common law powers inherent in the office of the attorney general of England. After the Revolutionary War, the new state courts decided that the common law powers exercised by the Attorney General of England and discussed above were an inherent part of the office of state attorney general. In addition, most states ratified this grant of powers in state constitutions or statutes. [2]

The method of selecting state attorneys general evolved in stages. Prior to Andrew Jackson's presidency, most states provided for the appointment of the attorney general by the governor or legislature. With the advent of Andrew Jackson's presidency, the concept of sovereign democracy emerged. The people were seen as the source of sovereign power, and they exercised it through popularly elected officials. In the late nineteenth century, states began to require the election of the attorney general. Today, 44 states elect the attorney general. Of the six states that appoint the attorney general, most provide for appointment by the governor, and some by the legislature or the state supreme court. [3]

With the evolution of sovereign democracy, state courts decided that state attorneys general now represented the rights, prerogatives, and interests of the general public in carrying out their common law duties of office. In effect the courts substituted the public for the king as the client of the attorney general, thus giving the attorney general the power to protect public prerogatives, property and revenue. Indeed, there are several state supreme court opinions which hold that an attorney general may bring any action in court deemed necessary to enforce or protect any public right or interest and as a corollary power may exercise virtually plenary discretion in the disposition of such action. However, while state attorneys general possess these common law powers, state constitutions or statutes may limit or preclude the exercise of some or all of them. [4]

Another development in the United States has been the expansion of the

powers of state attorneys general through the delegation of direct statutory grants of authority by the various state legislatures. For example, in most states, there are anti-trust and consumer protection trade regulation laws and the power to enforce them is delegated by most legislatures to the attorney general. (5)

Finally, the office of the state attorney general has been strengthened as an advocate for the people on a broad range of issues for reasons relating to its institutional characteristics. First, the office possesses a firm place in the tradition of English and American institutions; second, the office is a statewide one and, therefore, it has the advantages and disadvantages of statewide exposure and argument; third, the office is also closely connected to the state's political chief executive through the powers to give legal counsel to state agencies and to represent them in litigation; fourth, the office has a close connection to the judicial system; and fifth, the office is staffed by attorneys, and thus, a natural power base exists in the legal community of the state based upon the professional relationship among members of the Bar. (6)

The Role of State Attorneys General in Public Policy Decisions

It is practically impossible to make any public decision without knowing first, the legal parameters within which the agency or public official may act; and second, the adverse legal consequences of proposed courses of action within those parameters. For example, actions outside the scope of a public official's statutory powers could expose the official to personal liability for any damages caused as a result of the action.

Frequently, the practical boundaries of these legal parameters are determined by political constraints. Thus, in many public decisions involving legal issues, attorneys general play a significant indirect role through furnishing legal advice to help public officials balance the adverse legal consequences of their decisions within those politically imposed parameters. An example of this balancing occurs when deciding what can constitutionally be done to ensure local Alaskan hire by out-of-state companies when the most direct way to do so through mandating it by statute is unconstitutional based on cases decided by the Alaska and U.S. supreme courts. In this area, the legislature enacted a bill allowing the Alaska commissioner of labor to designate economically distressed zones based on economic and employment characteristics and require local hire on public projects within those zones. The bill was drafted with the state attorney general's advice. It was not totally politically acceptable, but was the best legal position constitutionally permitted based upon U.S. Supreme Court opinions. Even this new one has been challenged by a contractor as unconstitutional. Therefore, this issue will once again be reviewed by the appellate courts.

The legal advice given to state officials engaged in making these public decisions is frequently found in advisory opinions, a written memorandum from the attorney general which answers a question of law posed by any public official in the state executive or legislative branch of government. This mechanism, next to oral advice, is the most frequently utilized tool in public legal practice and plays an important role in policy decisions.

The legal status of opinions by attorneys general has been interpreted frequently by the courts. This status varies from state to state. The judiciary and the legislature generally treat them as persuasive, but not controlling on the legal issues they address. Several state courts and some state statutes provide that public officials of the executive branch are bound by them. Even where they are not recognized as binding on executive branch officials, most recipients follow them. The advantages in complying with them are, first, it can shield the official from the political consequences of a decision; and second, it allows the public official to retain official immunity from any personal liability for actions taken in reliance on the opinion. (7)

The Powers, Duties and Role of the Attorney General in Other States

The powers and duties of other state attorneys general range from a maxi-

In Support of Election:
"An elected attorney general would be 'the people's attorney' and function as an ombudsman and watchdog for them."

mum of highly centralized, exclusive authority to provide legal counsel to the state, litigate on behalf of the state and prosecute crimes to a minimum of shared state legal authority with no statewide criminal prosecution jurisdiction. For example, state attorneys general do not possess statewide criminal prosecution jurisdiction with the exception of Delaware, Rhode Island, and Alaska. In other states criminal prosecution is conducted by elected or appointed municipal, county or city district attorneys.

In addition, attorneys general usually do not have exclusive authority to represent the state in litigation or to be the exclusive legal advisor to state agencies. In many states, the governor's office has its own general counsel and many state agencies have their own house counsel. In those states, the attorney general represents the governor or agencies only in court. Legal advice to the governor or agency prior to litigation is furnished frequently by house counsel. In most states, while the attorney general issues official opinions upon request and thus, can influence public policy decisions; frequently, the attorney general does not play a significant policy making role within the state administration because the attorney general is a competing elected official. Exceptions to this situation exist when the governor and attorney general are political allies, share the same philosophy, or are personal friends. [8]

The Powers, Duties and Role of the Attorney General of Alaska

In Alaska, the attorney general is a member of the governor's cabinet. As such, he performs such advice functions as the general counsel to the governor and state officials. Thus, the attorney general plays a constant role in the development and formulation of public policy on a wide range of issues.

In addition, the Alaska Supreme Court has stated that the attorney general has the exclusive authority in the state government to make any and all decisions relating to the disposition of any state litigation and the exercise of this discretion by the attorney general within constitutional bounds is not subject to judicial review. However, in order to maintain good attorney-client relations, the attorney general rarely exercises such authority without consultation with and concurrence by the state agencies involved. In major cases, the attorney general also consults with the governor and, if necessary, the legislature. [9]

The Alaska attorney general is appointed by the governor, confirmed by the legislature, and serves at the pleasure of the governor. In Sections 44.23. 010-060 of the Alaska Statutes, the legislature created the Office of the Attorney General as Chief of the State Department of Law and vested that department with certain powers. Those powers are as follows:

1. Possession of authority as the exclusive legal advisor to the state executive branch of government, exercising this power through the drafting or reviewing of all executive branch legal instruments and legislation, and the rendering of legal opinions;
2. Representation of the state in all civil litigation;
3. Prosecution of all violations of state criminal laws;
4. Initiation of actions to collect state revenue;
5. Recommendation to the legislature of necessary changes in the laws;
6. Promotion of uniform laws adoption;
7. Preparation of information on landlord and tenant rights;
8. Possession of exclusive authority to enforce the consumer protection and anti-trust laws; and
9. Possession of all common law powers generally inherent in the office of the attorney general. Thus, the Alaska attorney general is an example of the highly centralized exclusive legal authority model.

Arguments in Support of Electing the Attorney General

The theme in the arguments supporting the election the attorney general is a simple one focusing on the independence that direct election would give the office. An elected attorney general would be "the people's attorney" and function as an omsbudsman and watchdog for them. Independent

election would mean that the attorney general was not the creature of a particular administration. As such, the attorney general would be free to render legal opinions solely on the basis of the law and not as a legal advocate for the administration. In addition, it is argued that an elected attorney general would be free to oppose policies of the state government that are considered inconsistent with the law and to investigate and prosecute apparent wrongdoing both in and out of government without fear or favor. [10]

Also, it is argued that the attorney general is elected in 44 states and the concept appears to be working in those jurisdictions. Some also argue that the attorney general's work is in areas where the governor has little or no interest, such as consumer protection, antitrust enforcement, and criminal prosecution. Thus, much of the work does not interfere with the executive responsibilities of the governor's office so that the results of the electoral competition are not as severe as supporters of the appointment process argue. It is also argued that if a governor wants house counsel to furnish legal advice to the governor's office, most governors can appoint such staff counsel. Furthermore, proponents of election argue it is not even necessary for the attorney general to act as general counsel to the governor's office. In addition, some also argue that because of the legal power of the office, an attorney general's duties are of a higher order, similar to that of a judge, and therefore, the attorney general should have the elected independence of a judge. [11]

Arguments In Support of Appointing the Attorney General

The arguments in opposition to the election of the attorney general and in support of appointment by the governor are more complex because of the need to discuss how an appointed attorney general impacts the structure and relationships within the executive branch of state government. The focus of the argument is based upon the need to strengthen the executive branch of government through the appointive power of the chief executive. [12]

Proponents of the appointment process believe that good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive, and unified team to carry out the responsibilities of the executive branch of government. Thus, the political accountability for actions of the executive branch and the executive responsibility for those actions are lodged in the office of the governor. It is clear where the responsibility lies and the governor is the one answerable to the public. [13]

In addition, they argue that when governors are forced to deal with a competing elected attorney general, there may be some question as to whether or not the advice, no matter how wise or legally sound, will be taken or looked upon with suspicion and hostility, thus giving rise to conflict. This is because the governor and attorney general would be bringing different policy perspectives to the same public issue. These perspectives may be rooted in different constituency bases. As both are elected, neither one can be considered a final authority to resolve the issue.

Some argue that electing the attorney general can delay the policy resolution process. They point out that in many states with an elected attorney general, governors appoint their own general counsel and, in addition, house counsel are appointed frequently by state agencies accountable to the governor. These house counsel may provide conflicting legal advice to that of the elected attorney general. The effect of this conflicting advice can be to delay resolution of those issues within the executive branch. In addition, whenever there is litigation involving state agencies, house counsel may file friend of the court briefs or otherwise intervene in court asserting a position on legal issues different from that of the elected attorney general. Proponents of the appointment process argue that those different positions can confuse the legislature, the public, and the courts on the executive branch policy. [15]

Advocates of appointing the attorney general also argue that electing the attorney general will increase state operating budgets. First, the governor

In Support of Appointment:
"Good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive and unified team . . . "

will insist on a general counsel and house counsel fo. agencies that are responsible to the governor's office. Thus, it will be necessary to pay for an additional layer of attorneys in the executive branch. Second, in order to maximize the perceived benefits of election, the elected attorney general must have additional, duplicate, independent support staff, not answerable to the governor, to execute personnel, budget, and other administrative policy or the governor could unfairly infringe on the attorney general's independence of action.

In response to the argument that only an elected attorney general can investigate and prosecute wrongdoing in state government with the appropriate degree of independence, proponents of the appointment process argue that the attorney general is not the governor's personal lawyer but the attorney for the institution of the governor's office.

Also, they point out that as a member of the legal profession, the attorney general is affiliated with the judiciary and functions as an officer of the court. Thus the appointed attorney general possesses the pre..quisite professional independence from the governor. They believe that the appointed attorney general is capable of investigating all officials of the executive branch of government, including the governor, and prosecuting wrongdoing if necessary.

This is because of constraints placed upon the holder of the office by the statutes, regulations, rules of court, and canons of professional and prosecutorial ethics which require the attorney general to act in these criminal matters based only upon the evidence, the law, and the canons. They also believe that to make decisions in these matters based upon personal and political reasons exposes the appointed attorney general to charges of obstruction of justice and the possibility of suspension or disbarment from the legal profession.

Subsidiary arguments in support of appointing the attorney general can also be made. Some argue that appointed attorneys general do "represent the public" and the misperception that they do not is created because they have no need to generate favorable publicity by constantly calling attention to external achievements in order to create an image as "the people's attorney." It is also argued that the appointed attorney general acts just like an omsbudsman through the rendering of legal advice to state officials as a member of the governor's team. This advice helps to ensure that these officials comply with the statutes and regulations governing their programs, and enforce fairness and impartiality in government dealings with the public.

Another argument in support of appointment is that an elected attorney general must allocate time to fund raising and other political activities, thus detracting from that required to manage the attorney general's office and resulting in a reduced credibility for the office because it will be perceived to be too "political." Legal opinions issued by an appointed attorney general are likely to be more professional because there is no need to pay attention to political polls when considering legal issues.

Some argue that interpreting the law and running a large law office are essentially technical tasks and it is not necessary that the official charged with these duties be elected. Also, it is believed that highly qualified attorneys would not become attorneys general if they had to run in a statewide election.

Finally, those who argue for appointment also have some tradition on their side. They state that no one has ever seriously suggested electing the United States attorney general. They believe that the people do participate in the selection of the appointed attorney general through their legislator when the legislature conducts the confirmation process, not unlike the advice and consent of the U.S. Senate over presidential nominees for attorney general. [16]

Conclusion

The underlying issue in these arguments is how the election of the Alaska attorney general affects the balance of power among the branches of state government and the policy-making process within the executive branch of government. In essence the argument revolves around whether one believes in a strong or weak executive branch

of government. The current strength of the Alaska executive in exercising its authority is its ability to speak with one voice. When the attorney general is elected, the ability of the executive branch to speak with one voice to the legislature, the judiciary and the public is altered and the accountability for executive branch actions is split. If one believes that the power of the executive branch should be divided or decentralized through direct electoral accountability of some of its parts, then one generally supports election of the attorney general.

An elected attorney general has specific constitutional and statutory duties of an executive nature. Those duties may include litigating civil law suits to enforce compliance with state law and to protect state interests and prosecuting violations of state criminal law. Both civil and criminal enforcement are based on the police power to protect the health, welfare and safety of society. These enforcement functions are a key element of executive authority, in essence, the power to force compliance with the law.

If the attorney general is elected, this power to enforce state law will be split between two elected officials. Those who support election believe this split serves to check potential abuses of executive power and makes the executive more responsive. Those who support appointment believe this system leads to frustration, delay, and a lack of responsiveness by the executive branch of government. Thus, depending on one's philosophy of government, the same facts are viewed quite differently. As the discussion demonstrates, this debate is really about two different views of state government and is not new in our history. The historical development of state constitutions in the country reflects this quandary of a strong versus a weak executive. Debate over the election of the attorney general is only a part of this larger issue. *-APAJ-*

References and Notes

(1) *See generally* State v. Finch, 280 P. 910 (Kan. 1928); A. Sill (Attorney General of New Jersey), *Common Law Powers of the Attorney General* 1-6 (1967); 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8 (1980). In addition, the common law powers of the attorney general eventually were summarized in Blackstone. Blackstone concluded that the attorney general could investigate and prosecute actions necessary to protect the real property of the King, review lands and chattels that should be held by the King, repeal royal grants or patents, recover for damages done to royal property, possess unclaimed property, examine the basis of an individual's claim to office, franchise, or privilege, compel admission and remission of a properly appointed official to his office, ensure proper maintenance of public charities and trusts, and initiate, without prior indictment by grand jury, misdemeanor; criminal prosecutions and, after grand jury indictment, felony prosecutions. 3 W. Blackstone, *Commentaries* 27, 257-64, 427; *see* A. Sills, *supra*.

(2) People v. Kramer, 68 N.Y. Supp. 383, 386 (1900); National Association of Attorneys General, *Powers, Duties and Operations of the State Attorneys General* 77-79 (1977). A partial listing of the common law powers found to be inherent in the office of the attorney general by several state court decisions can be summarized.

Attorneys general have the power to: 1) Recover damages for unlawfully removed sand and gravel from state tidewater lands; 2) Abate public nuisances through equitable actions; 3) Intervene in lawsuits over contested wills when the state has a possible interest; 4) Challenge a reduction of state tax assessments; 5) Institute actions to collect unpaid taxes and premiums for a state worker's compensation fund; 6) Seek removal of public officials for misconduct in office; 7) Proceed in equity to cancel the fraudulent registration of voters; 8) Enforce the restricted provisions of a deed from the state; 9) Enforce public and charitable trusts; 10) Bring suit to cancel a fraudulently procured United States patent for either land or an invention; 11) Intervene when the constitutionality of a state statute is attacked; 12) Challenge the constitutionality of a state statute; 13) Investigate criminal activities and appear

"In essence the argument revolves around whether one believes in a strong or weak executive branch of government."

before a grand jury; 14) Institute and dismiss criminal proceedings; 15) Supercede the local district attorneys in criminal prosecutions; 16) Make any bona fide disposition of these actions that in his or her judgment would be in the best interest of the public. A. Sills, *supra*, at 8-9.

(3) NAAG, *supra*, at 77-79.

(4) 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8; Sec. 18, at 22-23. See Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975); State ex rel. Shevin v. Yarborough, 257 S.2d 891 (Fla. 1972); State v. Finch, 280 P. 910, 911-12 (Kan. 1929); Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 149 A. 263 (N.J. 1930).

(5) *See, e.g.*, AS 45; *see generally* National Association Of Attorneys, *Powers, Duties and Operations of State Attorneys General* (1977)

(6) *See generally* T. Morris and W. Thompson, *The Attorney General as Public Advocate* 2 (1985).

(7) National Association of Attorneys General, *Representing State Agenies* (1979); 7 AM. Jur. 2d *Attorney General* Sec. 11, at 10-12.

(8) *See generally* National Association of Attorneys General, *The Structure of State Legal Services* 20-38 (1977)

(9) Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975).

(10) Report of Maryland Attorney General Francis B. Birch to the Constitutional Convention of Maryland (Sept. 29, 1967); Position Paper by New York Attorney General Lewis J. Lefkowitz, Constitutional Convention Committee on the Executive Branch (June 1, 1967); *Attorney General Should Be Elected–Not Appointed*, Attorney General Clarence A.H. Meyer, Outline of Remarks, Nebraska Constitutional Convention. *See generally* National Association of Attorneys General, *Powers, Duties and Operations of State Attorneys General* (1977); transcript of testimony House State Affairs Committee on HB 456 ("an Act authorizing advisory vote by the qualified voters of the state on the question of the election of the attorney general") (Jan. 20, 1984).

(11) *See* note 10, *supra*.

(12) National Municipal League, *Model State Constitution* 65-66 (6th ed. 1963.

(13) *See generally* letter from Attorney General Norman C. Gorsuch to Senator Patrick Rodey, Chairman of Senate Judiciary Committee, discussing SJR 9 ("Elected Attorney General") (Apr. 23, 1985); transcript of testimony, House State Affairs Committee, on HB 456 (Jan. 20, 1984).

(14) National Governors Conference, Center for Policy, Research, and Analysis, *Legal Advice for the Governor* (1976).

(15) *See* note 13, *supra*.

(16) *Id.* 4

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-APAJ-